

ENTERED

OCT 26 1960

F 2302

# San Francisco Law Library

436 CITY HALL

No. 167359

## EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.





Digitized by the Internet Archive  
in 2010 with funding from  
Public.Resource.Org and Law.Gov

U.S.C.A. 3070  
No. 15962 ✓

---

United States  
Court of Appeals  
for the Ninth Circuit

---

VUKA RADOVICH STEPOVICH, Executrix of  
the Estate of Mike Stepovich, Appellant,

vs.

NICK KUPOFF, JAMES ZUKOEV, MIKE KIT-  
OFF and NICK KABAK, a partnership doing  
business under the firm name and style of  
North Star Mining Company, Appellees.

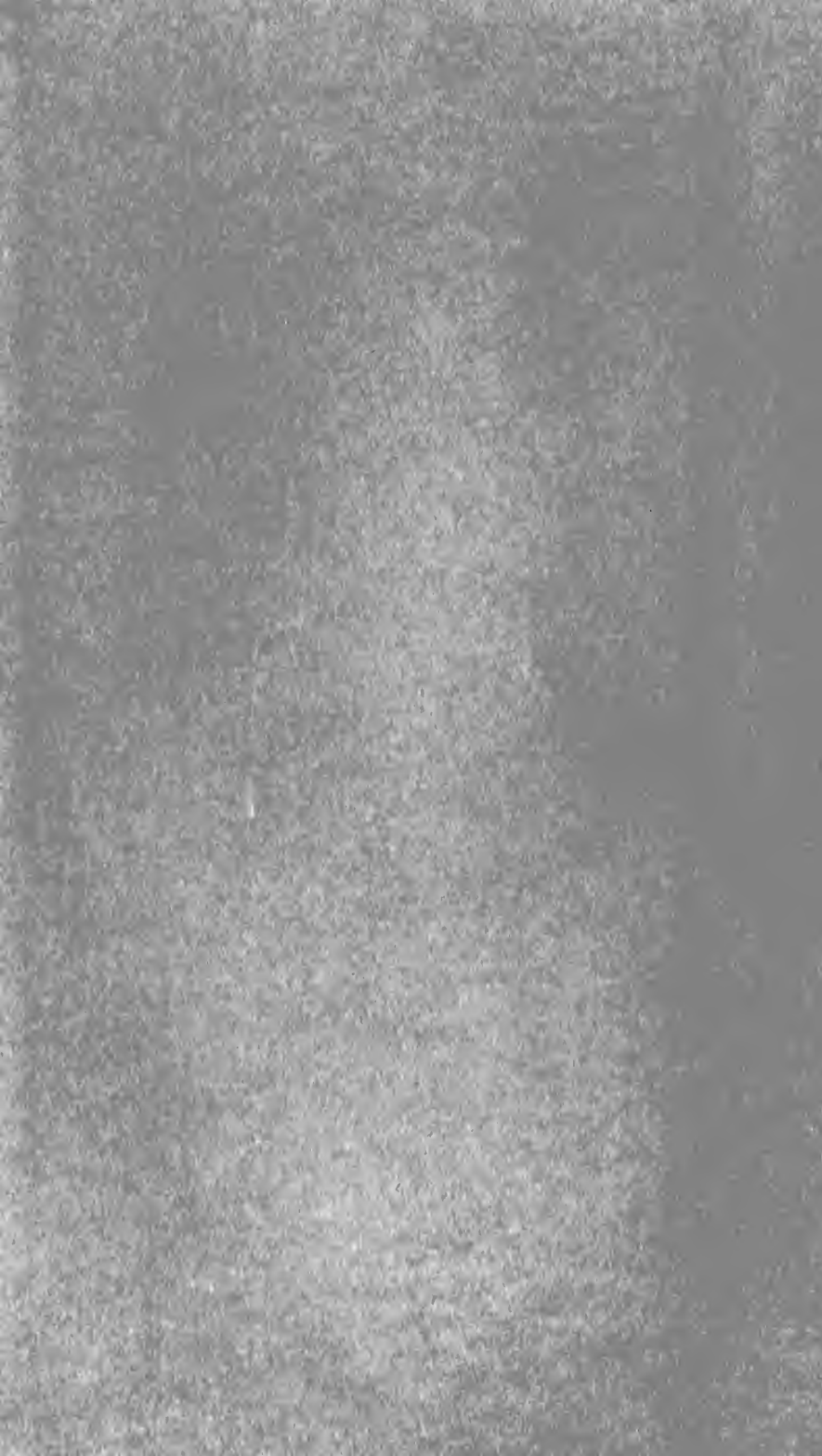
---

Transcript of Record

---

Appeal from the District Court for the Territory of  
Alaska, Fourth Judicial Division

FILED  
JUL 15 1958  
PAUL P. O'BRIEN, CLERK



No. 15962

---

United States  
Court of Appeals  
for the Ninth Circuit

---

VUKA RADOVICH STEPOVICH, Executrix of  
the Estate of Mike Stepovich, Appellant.

vs.

NICK KUPOFF, JAMES ZUKOEV, MIKE KIT-  
OFF and NICK KABAK, a partnership doing  
business under the firm name and style of  
North Star Mining Company, Appellees.

---

Transcript of Record

---

Appeal from the District Court for the Territory of  
Alaska, Fourth Judicial Division

---



## INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

|   | PAGE |
|---|------|
| Amended Answer .....  | 15   |
| Appeal:   |      |
| Certificate of Clerk to Transcript of Record on .....       | 36   |
| Designation of Record on (USCA).....                        | 411  |
| Notice of .....   | 35   |
| Statement of Points on (USCA).....                          | 410  |
| Certificate of Clerk to Transcript of Record...             | 36   |
| Complaint, Second Amended.....                              | 3    |
| Designation of Record To Be Printed (USCA)                  | 411  |
| Instruction No. 1 Requested by Defendant<br>(Refused) ..... | 32   |
| Instructions to the Jury.....                               | 20   |
| Judgment .....  | 33   |
| Names and Addresses of Attorneys.....                       | 1    |
| Notice of Appeal.....                                       | 35   |
| Reply to Amended Answer.....                                | 19   |

ii.

|  |                  |
|--|------------------|
| Second Amended Complaint.....  | 3                |
| Mining Lease Dated February, 1942, Mike<br>Stepovich and Paul Drazenovich et al..... | 9                |
| Statement of Points Appellant Intends to Rely<br>on (USCA) .....                     | 410              |
| Transcript of Proceedings and Testimony.....   | 37               |
| Argument to the Jury by<br>Mr. Taylor .....  | 373-395, 396-407 |
| Exceptions to Court's Instructions.....  | 367-372          |
| Motion for Directed Verdict by Mr. Cole....  | 350              |
| Motion to Dismiss from Complaint All Claim<br>for Loss of Future Profits.....        | 206              |
| Witnesses for Plaintiffs:  |                  |
| Crawford, James D.   |                  |
| —direct .....  | 102              |
| —cross .....   | 110              |
| Kupoff, Nick   |                  |
| —direct .....  | 39               |
| —recalled, direct .....  | 111, 147         |
| —cross .....   | 123, 142, 155    |
| Tavitoff, Alex   |                  |
| —direct .....  | 188              |
| Zukoev, James  |                  |
| —direct .....  | 156              |



# Transcript of Proceedings—(Continued):

## Witnesses for Defendant:

### Beistline, Earl H.

|                 |          |
|-----------------|----------|
| —direct .....   | 255      |
| —cross .....    | 272      |
| —redirect ..... | 281, 283 |
| —recross .....  | 283      |

### Colp, Douglas

|                         |     |
|-------------------------|-----|
| —direct .....           | 288 |
| —recalled, direct ..... | 291 |
| —cross .....            | 302 |
| —redirect .....         | 311 |

### Kupoff, Nick

|               |     |
|---------------|-----|
| —direct ..... | 288 |
|---------------|-----|

### Mathews, Ted C.

|                 |     |
|-----------------|-----|
| —direct .....   | 312 |
| —cross .....    | 321 |
| —redirect ..... | 330 |

### Stepovich, Vuka Radovich

|                 |     |
|-----------------|-----|
| —direct .....   | 235 |
| —cross .....    | 247 |
| —redirect ..... | 251 |
| —recross .....  | 251 |

|               |    |
|---------------|----|
| Verdict ..... | 34 |
|---------------|----|



## NAMES AND ADDRESSES OF ATTORNEYS

WARREN A. TAYLOR,  
WARREN W. TAYLOR,

P. O. Box 200,  
Fairbanks, Alaska,

Attorneys for Appellees.

CHARLES E. COLE,

Room 218 Lavery Building,  
Fairbanks, Alaska,

RICHARD J. ARCHER,  
MARSHALL L. SMALL,  
MORRISON, FOERSTER, HOLLOWAY,  
SHUMAN AND CLARK,

Crocker Bank Bldg.,  
620 Market Street,  
San Francisco, California,

Attorneys for Defendant and Appellant.



In the District Court for the Territory of Alaska,  
Fourth Division

No. 5395

NICK KUPOFF, JAMES ZUKOEV, MIKE  
KITOFF, NICK KABAK, a partnership  
doing business under the firm name and style  
of NORTH STAR MINING COMPANY,  
Plaintiffs,

vs.

VUKA RADOVICH STEPOVICH, Executrix of  
the Estate of MIKE STEPOVICH, Deceased,  
Defendant.

## SECOND AMENDED COMPLAINT

Comes now the above-named Plaintiffs and for  
cause of action against the Defendant above-named  
allege as follows:

### I.

That on the 13th day of February, 1942, James  
Zukoev, Nick Kupoff and Paul Drazenovich were  
co-partners doing business under the firm name and  
style of North Star Mining Company in the Fair-  
banks Recording Precinct, Fourth Division, Ter-  
ritory of Alaska. That on or about the 6th day of  
August, 1942, the said Paul Drazenovich, with the  
consent of the Lessor, Mike Stepovich, conveyed all  
his interest in the said partnership and in the lease-  
hold hereinafter described, to James Zukoev, Nick  
Kupoff, Mike Kitoff and Nick Kabak, and who  
thereafter were co-partners under the same firm and  
name of North Star Mining Company.

## II.

That Mike Stepovich, the Lessor named in the hereinafter described leasehold, died testate on or about the 21st day of September, 1944, at Los Gatos, California, and named Vuka Radovich Stepovich as Executrix of his estate; that upon the said will being proven in the Probate Court for the Territory of Alaska, Fourth Division, Fairbanks Precinct, Letters Testamentary were issued to the said Vuka Radovich Stepovich and she now is the duly appointed, qualified and acting Executrix of the Estate of Mike Stepovich, Deceased.

## III.

That on or about the 13th day of February, 1942, the said decedent did let, lease and demise unto the said Paul Drazenovich, Nick Kupoff and James Zukoev, certain mining ground situate in the Fairbanks Recording Precinct, Third Division, Territory of Alaska, which said mining ground is more fully described in said lease, a copy of which is attached hereto and by reference made a part hereof.

## IV.

That thereupon, pursuant to the terms of said lease, the said partners entered upon the said demised premises and began preliminary dead work preparatory to the commencement of actual mining operations. That they overhauled all machinery, equipment and tools; repaired the buildings on said ground; put the shaft in safe condition for mining and cleaned out the drift from the shaft to that part

of the said mining ground leased to said partners; and upon the completion of said preliminary dead work, diligently prosecuted mining operations contemplated under the terms and conditions of the said lease, and in all respects abided by all the terms, covenants and conditions of the same.

## V.

That the said decedent, notwithstanding the fact that all accounts had been fully settled between him and the Plaintiffs on the eighth day of August, 1942, did, on the 21st day of August, 1942, wrongfully cause to be filed in the District Court for the Territory of Alaska, Fourth Division, an action against said Plaintiffs and did wrongfully and unlawfully cause a writ of attachment to be issued by said Court commanding the United States Marshal for the Territory of Alaska, Fourth Division, to attach all of the property of the said Plaintiffs within the Territory of Alaska not exempt from execution, and in particular the machinery, tools, groceries, wood, dump, sluice boxes and all other property of the Plaintiffs on said mining ground with the exception of blankets and grips of said Plaintiffs, and did unlawfully, wrongfully and maliciously, abuse the process of this Court by directing and instructing the said United States Marshal to seize all of the said property of Plaintiffs and oust and eject the said Plaintiffs from the said demised premises.

## VI.

That on or about the 24th day of August, 1942, pursuant to said writ of attachment and instructions

as aforesaid, the United States Marshal for the Territory of Alaska, Fourth Division ousted and ejected the Plaintiffs from said demised premises, and placed a custodian in charge thereof and Plaintiffs were prevented from reentering said premises and continuing work under said lease.

## VII.

That thereafter on the 24th day of November, 1942, the said decedent, by his attorney entered a voluntary non-suit of said action in this court. That at the time the said non-suit was entered by the Defendant, winter had set in and it was impossible for Plaintiffs to resume mining operations which had been interrupted by the wrongful and malicious acts of the Decedent.

## VIII.

That at the time of the ousting and ejecting of Plaintiffs as aforesaid, Plaintiffs had taken out a large dump of rich gold bearing gravels and had put a large amount of the same through the sluice boxes, but by reason of said ouster and ejectment of Plaintiffs, they were unable to clean the sluice boxes or wash the balance of the dump. Plaintiffs believe and therefore aver, that the said dump and sluice boxes contained twenty thousand (\$20,000.00) Dollars worth of gold, all of which decedent appropriated to his own use and profit. That from the date of the entry of the Plaintiffs on the said demised premises they had expended a large sum or sums, of money in the development and operation of said property. That by reason thereof, the Plain-



tiff up to the time of the ouster and ejectment as aforesaid, suffered a loss of Six Thousand Seven Hundred Ninety-one and 29/100 (\$6,791.29) Dollars, no part of which has been paid to Plaintiffs by decedent or defendant.

### IX.

The Plaintiffs believe and therefore aver that they would have recovered \$150,000.00 in gold from said demised premises during the remainder of the term of said lease, to-wit: between the 24th day of August, 1942, and the 1st day of November, 1943, had they not been so maliciously, unlawfully and wrongfully ousted and ejected from said premises, of which sum one hundred thousand (\$100,000.00) Dollars would have been Plaintiffs' share under the terms of said Lease; that by such malicious, unlawful and wrongful ousting and ejecting of Plaintiffs from said demised premises, they were damaged in the sum of \$100,000.00, no part of which has been paid by the Decedent or Defendant herein, although demand has been made by Plaintiffs for payment of the same.

### X.

That each, every and all the acts and doings of said decedent were malicious and wrongful, were without any just or probable cause and were illegal and oppressive and were done with a wanton and reckless disregard of the rights of these Plaintiffs, and each of them, and with the intent of ousting and ejecting the Plaintiffs from said mining ground and preventing them from mining under said lease, and to damage Plaintiffs thereby.

Wherefore, Plaintiffs pray judgment against Defendant as follows:

First—For the sum of \$106,791.29 as compensatory damages.

Second—For the Plaintiffs costs and disbursements incurred herein.

Third—For such other and further relief as to the Court may seem just and equitable.

/s/ WARREN A. TAYLOR,  
Attorney for the Plaintiffs.

United States of America,  
Territory of Alaska—ss.

Nick Kupoff, being first duly sworn on oath deposes and says: That he is one of the Plaintiffs in the foregoing action; That he has read the foregoing complaint and knows the contents thereof, and that the same is true as he verily believes.

/s/ NICK KUPOFF.

Subscribed and sworn to before me this 18th day of October, 1947.

[Seal] /s/ WARREN A. TAYLOR,  
Notary Public in and for  
Alaska.

My Commission expires: 8/11/51.

Receipt of copy acknowledged.

## MINING LEASE

This Lease, made and executed this . . . . . day of February, A. D. 1942, by and between:

Mike Stepovich, of Fairbanks, Alaska, party of the first part, hereinafter referred to as Lessor and Paul Drazenovich, James Zukov, and Nick Kupoff, of the same place, parties of the second part, hereinafter referred to as the Lessees,

### Witnesseth:

That lessor, for and in consideration of the covenants and agreements to be by lessees kept and performed as hereinafter set forth and the rentals by said lessees to be paid to lessor as set forth hereinafter, has leased, and does hereby lease and let, unto the said lessees the following described mining ground situate in the Fairbanks Mining and Recording Precinct, Fourth Division, Territory of Alaska, to-wit:

All that certain portion of the Eastern Star Mining claim that can be worked and mined from the working shafter used by said lessor during the mining season of 1941, said Eastern Star being a 40 acre patented placer mining claim situate on Fish Creek, a tributary of the Little Chena River, in the said Fairbanks Precinct;  
for the term from date hereof until and including the 1st day of November, 1943.

The terms and conditions of this lease are as follows:

1. That the lessees shall, after the execution of

this lease, enter into possession of said mining property, and are to have possession of the buildings, machinery, tools, and mining equipment now situate on said premises, and have the use of same during the term of this lease; provided, however, lessees shall not loan or rent tools or equipment belonging to said lessor, nor suffer anyone not connected or interested in this lease or employed by lessees to occupy any of the buildings so let.

2. That upon entering possession of said premises, a complete inventory is to be taken of all the personal property, machinery, equipment, tools, messhouse paraphernalia, stock of groceries, and the wood and timber now on said premises; and said lessees will be responsible for the return of all the property shown in said inventory, with the exception of groceries, wood, and timbers used, at the expiration or termination of this lease, in as good a condition as received, wear and tear excepted.

3. That lessees may use the wood on said premises by paying to lessor therefor the sum of \$10.00 per cord, and may use the timber and groceries located on said premises by paying for all so used a price to be agreed upon between lessor and lessees; and said lessees shall pay for all such wood, timber, and groceries so used out of the first cleanup on said premises in 1942.

4. That lessees shall have the use of the 22 Caterpillar during the period of this lease at an agreed rental of \$500.00 for said period, said rental to be paid as follows: \$250.00 during the month of July,

1942, and the balance of \$250.00 on or before September 1, 1942.

5. That for the rights and privileges hereby leased, the said lessees shall pay and deliver to said lessor, or his designated agent, thirty-three and one-third per cent ( $33\frac{1}{3}\%$ ) of the gross amount of all gold, gold dust, and other precious metals and minerals derived from each and every cleanup held on said ground.

6. That said lessees shall, within ten days after date hereof, enter upon said premises for the purpose of developing and mining said premises and said lessees shall thereafter during the term of this lease diligently and continuously without interruption, carry on mining operations on said ground as extensively as good mining methods dictate and as is proper by the particular method chosen by lessees for working said ground.

7. That said lessees shall mine said ground in a first class miner-like manner, and put through the sluice boxes all gold bearing gravel that justifies a reasonable profit; and shall do only such panning and rocking as is necessary to keep the run of pay, and shall keep an accurate record of the values recovered from such pannings to be submitted to lessor at each cleanup.

8. That lessees shall clean up only in the presence of the lessor, or his agent, and shall keep securely at their own risk all the gold, gold dust, and other precious metals and minerals extracted

from said ground, and shall, under no circumstances, rearrange or change the sluice boxes between clean-ups without the permission or presence of lessor; and, after sluicing and the water is turned off in the boxes, lessees shall completely cover the riffles in said boxes with gravel so as not to expose to view the values contained in said boxes.

9. That lessor, or his qualified agent, shall be privileged to enter upon said ground at any and all times during the life of this lease for any and all lawful purposes, and to pan said ground to ascertain the value thereof, and to inspect said workings to determine whether or not they are being conducted in accordance with the terms and conditions of this lease, and shall be privileged to be present at every operation in connection with said clean-ups; and said lessees shall notify said lessor, or his agent, of the date of holding each and every clean-up at least twenty-four hours before the time when same shall be held.

10. That lessees shall deposit the said  $33\frac{1}{3}\%$  rental as hereinabove specified, with the said lessor, or his agent, when said mineral products shall have been cleaned and weighed, or, at the option of said lessor, credit the same to his account at the Bank of Fairbanks, at Fairbanks, Alaska, or such other banks as lessor shall designate.

11. That lessees shall pay all expenses of mining on said premises and shall at all times hold lessor harmless by reason of any indebtedness contracted by lessees, and shall keep posted on said ground

during the time of their possession of the above-described premises not less than three non-liability notices, to be furnished by lessor.

12. That lessees shall keep the ditches leading to said leased premises in good repair during the period of this lease.

13. That lessees shall gather up all pipe and hydraulic paraphernalia belonging to lessor located in the vicinity of the said leased premises and pile same when and where directed by said lessor.

14. That this lease shall not be assigned in whole or in part without the written consent of lessor being first had and obtained.

15. That any substantial violation of the terms of this lease shall be authority for lessor to cancel same, provided, however, that he shall notify lessees of said violation, and if same shall not be remedied within ten days from the time of said notice, lessor may then cancel said lease and enter into possession of said premises, using all necessary force so to do.

16. That in the event of a cancellation of this lease or the termination thereof by operation of time, or otherwise, lessees shall surrender possession of said premises, free and clear of all liens and encumbrances of any nature, whatsoever, to said lessor; and all the property listed in said inventory, with the exceptions as hereinabove stated, as well as any and all other equipment or paraphernalia purchased by lessees during the term of this lease, shall be left on said property, and said lessees are

not to remove from said premises anything of value other than their own personal belongings, such as blankets and grips.

17. To abide by the terms and conditions of this lease and fully perform the covenants and agreements therein contained, the parties hereto do hereby bind themselves, and their, and each of their, heirs, executors, administrators, and assigns, firmly by these presents.

In Witness Whereof, the said parties hereto have hereunto set their hands and seals the day and year first above written.

[Seal]              MIKE STEPOVICH,

                         Lessor.

[Seal]              PAUL DRAZENOVICH.

[Seal]              JAMES ZUKOV.

[Seal]              MIKE KUPOFF.

In the presence of:

                         JUNE BROWN,

                         AUGUST W. CONRAD.

United States of America,

Territory of Alaska—ss.

This is to certify that on this, the 13th day of February, A. D., 1942, before me, the undersigned, a Notary Public in and for the Territory of Alaska, duly commissioned and sworn, personally appeared Mike Stepovich, Paul Drazenovich, James Zukov and Nick Kupoff, to me known to be the identical individuals mentioned in and who executed the



within and foregoing lease, and each acknowledged to me that he signed and sealed the same freely and voluntarily for the uses and purposes therein specified.

Witness my hand and Notarial Seal the day and year in this certificate first written.

[Seal]

JUNE BROWN,

Notary Public in and for the  
Territory of Alaska.

My Commission expires November 23, 1943.

[Endorsed]: Filed October 20, 1947.

---

[Title of District Court and Cause.]

### AMENDED ANSWER

Comes Now the Defendant above named and for answer to Plaintiffs' Second Amended Complaint on file herein admits, denies and alleges as follows:

#### I.

Defendant admits that on the 13th day of February 1942, James Zukoev, Nick Kupoff and Paul Drazenovich were co-partners, doing business under the firm name and style of North Star Mining Company in the Fairbanks Recording Precinct, Fourth Judicial Division, Territory of Alaska.

Defendant denies each and every other allegation contained in paragraph one of the Second Amended Complaint of Plaintiffs, except as hereinabove specifically admitted.

#### II.

Defendant admits the allegations contained in

Paragraph two of said Second Amended Complaint of Plaintiffs.

### III.

Defendant admits the allegations contained in Paragraph three of said Second Amended Complaint of Plaintiffs.

### IV.

As to the allegations contained in Paragraph IV of Plaintiffs' Second Amended Complaint the defendant does not have sufficient information or knowledge upon which to form a belief and therefore denies the same, and the whole thereof.

### V.

As to the allegations contained in Paragraph V of said Second Amended Complaint the Defendant does not have sufficient knowledge or information upon which to form a belief and therefore denies the same, and the whole thereof.

### VI.

As to the allegations contained in Paragraph VI of said Second Amended Complaint the Defendant does not have sufficient knowledge or information upon which to form a belief and therefore denies the same, and the whole thereof.

### VII.

Defendant admits that on the 24th day of November, 1942, said decedent by his attorney entered a voluntary non-suit of said action in said court. Defendant denies all other allegations contained in Paragraph VII of said Second Amended Complaint for the reason Defendant does not have suffi-

cient knowledge or information upon which to form a belief and therefore denies the same.

VIII.

As to the allegations contained in Paragraph VIII of said Second Amended Complaint the Defendant does not have sufficient knowledge or information upon which to form a belief and therefore denies the same, and the whole thereof.

IX.

Defendant denies each and every allegation contained in Paragraph IX of said Second Amended Complaint, and the whole thereof.

X.

Defendant denies each and every allegation contained in Paragraph X of said Second Amended Complaint, and the whole thereof.

And, for a First, Further, Separate and Affirmative Defense to Said Second Amended Complaint, Defendant Alleges:

That no claim as required by law has been filed with said Defendant, as Executrix of the Estate of Mike Stepovich, Deceased, for any of the alleged act or acts complained of by Plaintiffs in their Second Amended Complaint.

And, for a Second, Further, Separate and Affirmative Defense to Said Second Amended Complaint, Defendant Alleges:

That the above-entitled action was filed in the above-entitled court on the 15th day of October, 1945, and the acts complained of in said Plaintiffs' Second Amended Complaint were alleged to have

been made on and between the 21st day of August, 1942 and the 24th day of August, 1942; and, therefore, this action was not commenced within the time prescribed under the laws of the Territory of Alaska as particularly set forth in Section 3358 of the compiled laws of Alaska, 1933, more than two years having expired from the time of the acts complained of and the filing of said complaint herein.

Wherefore, Defendant as Executrix of the estate of Mike Stepovich, Deceased, demands judgment against plaintiffs for her costs and disbursements herein together with a reasonable attorneys fee to be allowed by the court and that plaintiffs recover nothing from defendant by their action.

E. B. COLLINS and  
JULIEN A. HURLEY,  
/s/ By JULIEN A. HURLEY,  
Attorneys for Defendant.

United States of America,  
Territory of Alaska—ss.

I, E. B. Collins, being first duly sworn, on oath depose and say:

That I am one of the attorneys for the Defendant in the above-entitled action. That the Defendant is not present in the Territory of Alaska and therefore cannot make this verification. That I am familiar with all facts contained in the Second Amended Complaint on file herein and in this action. That I have read the within and foregoing Amended An-

swer, know the contents thereof, and the same is true, as I verily believe.

/s/ E. B. COLLINS.

Subscribed and sworn to before me this 5th day of May, 1948.

[Seal]      /s/ MYRTLE L. BOWERS,  
Notary Public in and for  
Alaska.

My commission expires: 6/10/50.

Service of copy acknowledged.

[Endorsed]: Filed May 5, 1948.

---

[Title of District Court and Cause.]

## REPLY

Come now the plaintiffs herein and in reply to defendant's amended answer allege as follows:      .

### I.

In reply to defendant's first further, separate and affirmative defense, plaintiffs deny each and every material allegation contained therein.

### II.

In reply to defendant's second further, separate and affirmative defense, plaintiffs deny each and every material allegation therein contained.

Wherefore, plaintiffs pray for the relief as set forth in their amended complaint.

/s/ WARREN A. TAYLOR,  
Attorney for Plaintiffs.

United States of America,  
Territory of Alaska—ss.

Nick Kupoff, being first duly sworn, on oath, deposes and says: That he is one of the plaintiffs in the foregoing action; that he has read the foregoing Reply and knows the contents thereof, and that the same is true as he verily believes.

/s/ NICK KUPOFF.

Subscribed and sworn to before me this 10th day of June, 1948.

[Seal]      /s/ WARREN A. TAYLOR,  
Notary Public for Alaska.

My Commission expires 8/11/51.

Service of the foregoing acknowledged.

[Endorsed]: Filed June 9, 1948.

---

[Title of District Court and Cause.]

## INSTRUCTIONS TO THE JURY

Ladies and Gentlemen of the Jury:

It becomes my duty as Judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you.

It is in your exclusive province to determine the facts in this case, and to judge the effect and value of the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law

stated to you by me. The law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Your power of judging the evidence is not an arbitrary one but is to be exercised with legal discretion and in subordination to the rules of evidence.

The action in this case is for damages for breach by the lessor of an implied covenant of quiet enjoyment.

As used in these instructions, the term "Lessees" has reference to the plaintiffs, Nick Kupoff, James Zukoev, Mike Kitoff and Nick Kabak, a partnership doing business under the name of North Star Mining Company. The term "Lessor", as used in these instructions, has reference to the defendant's testator, the deceased, Mike Stepovich.

It is undisputed that the plaintiffs had entered into a lease of the Eastern Star Placer Mining Claim, situated in the Fairbanks Mining and Recording Precinct, Fourth Division, Territory of Alaska, and owned by defendant's testator, Mike Stepovich, which lease has been admitted in evidence as plaintiffs' exhibit No. "A". The lease was executed by the plaintiffs and Mike Stepovich on the 13th day of February, 1942, and was by its terms to extend for a term ending November 1, 1943. Under the terms of the lease, the plaintiffs as lessees were to have the possession and use of the buildings, machinery, tools and equipment then situated on the Eastern Star Claim. The lessees were given the right to work and mine the Eastern

Star Claim insofar as it could be worked and mined through an existing shaft on the claim. The lessees were required to pay to the lessor, Mike Stepovich, as rental or royalty for their lease one-third of the gross amount of all gold and gold dust derived from each and every cleanup held on the Eastern Star Claim.

Plaintiffs in their complaint claim that from the time of the execution of the lease up to and including the 24th day of August, 1942, plaintiffs had commenced and were prosecuting the mining operations contemplated under the terms and condition of the lease, and that throughout this period they had complied with all the terms, covenants and conditions of the lease on their part to be performed.

Plaintiffs claim that on the 21st day of August, 1942, Mike Stepovich, defendant's testator, wrongfully caused to be filed in this Court an action against the plaintiffs, and that at approximately the same time, Mike Stepovich wrongfully and unlawfully caused a writ of attachment to be issued by this Court commanding the United States Marshal to attach all of the property of the plaintiffs found within the Territory of Alaska, and not exempt from execution, in particular the machinery, tools, groceries, wood, dump, sluice boxes and all other property of the plaintiffs located at the Eastern Star Claim.

Plaintiffs claim at the time of the issuance of the attachment, Mike Stepovich also directed and instructed the United States Marshal to oust and



eject the plaintiffs from the Eastern Star Claim.

Plaintiffs claim that on the 24th day of August, 1942, pursuant to the writ of attachment and the alleged instructions from Mike Stepovich, the United States Marshal ousted the plaintiffs from the Eastern Star Claim, placed a custodian in charge of the claim, and as a result of the Marshal's actions, the plaintiffs were prevented from reentering the Eastern Star Claim and continuing their mining operations on the leased premises.

Plaintiffs claim that thereafter on the 24th day of November, 1942, Mike Stepovich, by his attorney, entered a voluntary nonsuit of the action which he instituted against the plaintiffs on August 21, 1942. That at the time this nonsuit was entered, it was impossible for the plaintiffs to resume their mining operations at the Eastern Star Claim due to the prevailing winter weather conditions.

Plaintiffs claim that by reason of Mike Stepovich's institution of the suit against the plaintiffs, his obtaining the issuance of an attachment against plaintiffs, his instructing the U. S. Marshal to oust and eject plaintiffs from the claim, the U. S. Marshal's subsequent attachment of plaintiffs' properties and ejectment and ouster of the plaintiffs from the claim, the plaintiffs were damaged in the amount of \$6,791.29, for monies expended in the development and operation of the mine up to the time of their eviction on August 24, 1942 and that the plaintiffs were further damaged in the amount of \$100,000.00 for loss of profits from their mining operations on the Eastern Star Claim

for the period August 24, 1942 to November 1, 1943, the remainder of the term of their lease.

Defendant, as Executrix of the estate of Mike Stepovich, in her Answer denies that the plaintiffs had complied with all the terms, covenants and conditions of the lease from its inception up to and including the 24th day of August, 1942.

Defendant denies that Mike Stepovich wrongfully caused to be filed on August 21, 1942 in this Court an action against the plaintiffs and denies that Mike Stepovich wrongfully and unlawfully caused a writ of attachment to be issued by this Court to attach the plaintiffs' property located in the Eastern Star Claim. Defendant further denies that Mike Stepovich directed and instructed the United States Marshal to oust and eject the plaintiffs from the Eastern Star Claim.

Defendant denies that plaintiffs' property was attached pursuant to the writ of attachment and further denies plaintiffs alleged ouster and ejection from the Eastern Star Claim by the United States Marshal acting pursuant to the writ of attachment and upon alleged instructions from Mike Stepovich and also denies the alleged subsequent prevention of plaintiffs from reentering the Eastern Star Claim and continuing their mining operations.

Defendant denies that the plaintiffs were damaged in the amount of \$6,791.29 for monies expended in the development and operation of the mine up to the time of their alleged wrongful ouster and ejection at the instruction or direction of Mike Stepovich.

Defendant further denies that the plaintiffs were damaged in the amount of \$100,000.00 for loss of profits from their mining operations on the Eastern Star Claim for the period August 24, 1942 to November 1, 1943, the remainder of the term of the lease, as a result of their alleged wrongful ouster and ejection at the instruction or direction of Mike Stepovich.

By her Answer, the defendant has admitted that on February 13, 1942, plaintiffs, as lessees, and Mike Stepovich, as lessor, entered into a lease of the Eastern Star Placer Mining Claim. Defendant has also admitted by her Answer that on November 24, 1942, Mike Stepovich, by his attorney, entered a voluntary nonsuit of the action he instituted against the plaintiffs on August 21, 1942.

You are instructed that the law implies a covenant of quiet enjoyment in the lease of the Eastern Star Placer Mining Claim entered into between the plaintiffs and Mike Stepovich.

As used in these instructions, the term covenant of quiet enjoyment means that the lessor, Mike Stepovich, agreed that the lessees, the plaintiffs, shall have the quiet, peaceable possession, and enjoyment of the leased premises in their prosecution of the mining operations contemplated by the terms of the lease so far as regards any act or acts of the lessor or persons acting under his direction or authority.

The burden of proof is upon the plaintiffs to prove that the lessor, Mike Stepovich, breached this covenant of quiet enjoyment of the lease. The

plaintiffs, to show a breach of this covenant, must prove that the lessor, Mike Stepovich, by unjustified conduct or unjustified legal proceeding taken under his authority and with the intent to deprive plaintiffs of their beneficial enjoyment of the Eastern Star Placer Mining Claim, or with the intent to materially obstruct or interfere with plaintiffs' beneficial enjoyment, actually or constructively evicted the plaintiffs from the Eastern Star Placer Mining Claim.

In a civil action, proof sufficient to establish any fact by any party to the satisfaction of the jury must be by a preponderance of the evidence. A preponderance of the evidence means that which has the greater weight, or carries with it the most convincing force.

You are instructed that if you find under the instructions I have previously given you that the lessor, Mike Stepovich, breached the covenant of quiet enjoyment which the law implies in this lease, then the plaintiffs are entitled to recover such profits, if any, as have been shown by a preponderance of the evidence, that they would have made under the lease were it not for the breach of the covenant of quiet enjoyment by the lessor, Mike Stepovich.

The plaintiffs are not entitled to recover for loss of profits unless you can determine with reasonable certainty the quantity of gold which was and would have been mined by the plaintiffs from the Eastern Star Mine over the term of this lease. Once you have determined the total value of the

quantity of gold which was and would have been mined by the plaintiffs over the term of this lease, you must then deduct therefrom all rentals or royalties which under the lease were required to be paid to Mike Stepovich in the amount of one-third of the value of all gold which was and would have been mined over the term of the lease, you must also deduct from this value the costs of mining the gold which was and would be mined over the term of the lease, which costs include all the expenses of the operation of the mine and including as an element of such costs, the development and operational costs incurred by plaintiffs up to the time of their eviction.

The amount of damages alleged in the complaint to have been suffered by the plaintiffs is \$100,000.00 for loss of profits.

You are instructed that this allegation of damages is merely a claim, it is not evidence, and this allegation must not be considered by you as evidence in the event you should undertake to determine the amount of plaintiffs' damages.

You are further instructed that the plaintiffs' claim in the amount of \$6,791.29 for expenses in the development and operation of the mine up to the time of their alleged eviction is not as a matter of law recoverable against the defendant. These expenses are to be considered by you only as an element of costs in determining plaintiffs loss of profits as I have heretofore instructed you.

You are not permitted to award plaintiffs speculative damages, by which term is meant such antici-

pated losses of profits which, although possible, are remote, conjectural or speculative.

The jury are the sole and exclusive judges of the effect and value of evidence addressed to them and of the credibility of the witnesses who have testified in the case. The character of the witnesses, as shown by the evidence, should be taken into consideration for the purpose of determining their credibility, whether or not they have spoken the truth. The jury may scrutinize the manner of witnesses while on the stand, and may consider their relation to the case, if any, and also their degree of intelligence. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; his interest in the case, if any, or his bias or prejudice, if any, against one or any of the parties; by the character of his testimony. In judging the testimony of a defendant, you may consider his interest in the outcome of this matter, his hopes and his fears, and what he has to gain or lose as a result of your verdict. A witness may be impeached also by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to the cause on trial, or by proof that he has been convicted of a crime.

A witness wilfully false in one material part of his or her testimony may be distrusted in others. The jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point; if you are convinced that a witness has stated what was untrue as to a material point, not as a result of mistake or inadvertence,

but wilfully and with the design to deceive, then you may treat all of his or her testimony with distrust and suspicion, and reject all unless you shall be convinced that he or she has in other particulars sworn to the truth.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and, therefore, if the weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

You are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind, as against the declarations of a lesser number or a presumption or other evidence which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

The rules of evidence ordinarily do not permit a witness to testify as to his opinions or conclusions. A so-called expert witness is an exception to this rule. A witness who by education and experience

has become expert in any art, science, profession or calling may be permitted to state his opinion as to a matter in which he is versed and which is material to the case, and may also state the reasons for such opinion. You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves; and you may reject it entirely if you conclude the reasons given in support of the opinion are unsound.

You shall not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of fact or facts.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the Court; such matter is to be treated as though you never had known of it.

You are to decide this case solely upon the evidence that has been received by the Court, and the inferences you may reasonably draw therefrom, and in accordance with the law as I state it to you.

If during this trial I have said or done anything which has suggested to you that I favor the claims or position of either party, you will not suffer yourself to be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are, or are not worthy of belief; what facts are, or are not established; or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.



It is your duty as jurors to consult with one another and to deliberate, with a view of reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when you are convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the purpose of returning a verdict solely because of the opinion of the other jurors.

Upon retiring to your jury room, you will select one of your number foreman, who will speak for you and sign the verdict unanimously agreed upon.

You will take with you to the jury room these instructions, together with the exhibits and forms of verdict. If you find in favor of the plaintiffs and against the defendant, you will use Verdict No. I and insert therein the amount of damages which you find the plaintiffs are entitled to recover. If you find in favor of the defendant and against the plaintiffs, you will use Verdict No. II.

Given at Fairbanks, Alaska, this 17th day of October, 1957.

/s/ VERNON D. FORBES,  
District Judge.

[Title of District Court and Cause.]

VERDICT No. II

We, the Jury duly impaneled and sworn to try the above entitled case, find in favor of the defendant and against the plaintiffs.

Dated at Fairbanks, Alaska, this .... day of October, 1957.

.....

Foreman.

[Endorsed]: Filed October 17, 1957.

---

[Title of District Court and Cause.]

DEFENDANT'S REQUESTED  
INSTRUCTION: #1

The value of the gold remaining in the sluice boxes in the Eastern Star Mining Claim when plaintiffs left the claim in 1942, if any, is not to be included in any award of damages you might make.

Refused.

/s/ VERNON D. FORBES,  
Judge.

Acknowledgment of Service Attached.

[Endorsed]: Filed October 17, 1957.

In The District Court for the District of  
Alaska, Fourth Judicial Division

No. 5395

NICK KUPOFF, JAMES ZUKOEV, MIKE  
KITOFF, NICK KABAK, a partnership,  
doing business under the firm name and style  
of NORTH STAR MINING COMPANY,  
Plaintiffs,

vs.

VUKA RADOVICH STEPOVICH, Executrix of  
the Estate of Mike Stepovich, deceased,  
Defendant.

### JUDGMENT

This Matter came on regularly for trial on the 14th, 15th, 16th and 17th days of October, 1957, before a jury duly empanelled to try said cause, the Plaintiffs appearing in person and represented by their attorneys, Warren A. Taylor and Warren Wm. Taylor, and the Defendant being personally present and represented by her attorney, Charles E. Cole; and the witnesses on behalf of the Plaintiffs and Defendant were sworn and examined.

After hearing the evidence, the argument and instructions of law by the Court, the jury retired to consider of their verdict and did thereafter return into Court their verdict as follows:

“In The District Court for the District of  
Alaska, Fourth Judicial Division”

No. 5395

Nick Kupoff, James Zukoev, Mike Kitoff, Nick Kabak, a partnership, doing business under the firm name and style of North Star Mining Company, Plaintiffs, vs. Vuka Radovich Stepovich, Executrix of the Estate of Mike Stepovich, deceased, Defendant.

VERDICT No. 1

We, the Jury duly impaneled and sworn to try the above entitled case, find in favor of the Plaintiffs and against the Defendant, and assess the damages, which we find that Plaintiffs are entitled to recover, in the sum of \$26,802.12.

Dated at Fairbanks, Alaska, this 17th day of October, 1957.

/s/ RUSSELL H. PUTMAN,  
Foreman.

Therefore, it is considered and adjudged by the Court that the Plaintiffs, Nick Kupoff, James Zukoev, Mike Kitoff, Nick Kabak, a partnership, doing business under the firm name and style of North Star Mining Company, do have and recover of and from the Defendant, Vuka Radovich Stepovich, Executrix of the estate of Mike Stepovich, deceased, the sum of \$26,802.12, together with interest thereon at the rate of six (6%) per cent per annum from the 7th day of March, 1958; and

the further sum of \$900.00 as and for Plaintiffs' attorney fees in this cause, together with costs in the sum of \$93.04, to be taxed by the Court.

Let Execution Issue According to Law.

Dated at Fairbanks, Alaska, this 7th day of March, 1958.

/s/ VERNON D. FORBES,  
U. S. District Judge.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 10, 1958.

---

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that Vuka Radovich Stepovich, Executrix of the Estate of Mike Stepovich, deceased, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 7th day of March, 1958.

Dated: March 19, 1958.

/s/ CHARLES E. COLE,  
Attorney for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 20, 1958.

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the following list comprises all proceedings had in this cause that are listed on the Designation of Record of the defendant and appellant herein, viz:

1—Judgment filed March 10, 1958. Pages 1 to 2.

2—Notice of Appeal filed March 20, 1958. Page 3.

3—Instructions to the Jury. Pages 4 to 23.

4—Designation of Record. Pages 24 to 25.

Transcript of Testimony at Trial, separately bound. Pages 1 to 404.

Witness my hand and the seal of the above-entitled Court this 5th day of April, 1958.

[Seal]

JOHN B. HALL,  
Clerk of Court.

In the District Court for the District of Alaska,  
Fourth Judicial District

No. 5395 Civil

NICK KUPOFF, JAMES ZUKOEV, MIKE  
KITOFF, NICK KABAK, a partnership,  
doing business under the firm name and style  
of NORTH STAR MINING, Plaintiffs,

vs.

VUKA RADOVICH STEPOVICH, Executrix of  
the estate of Mike Stepovich, deceased,  
Defendant.

TRANSCRIPT OF PROCEEDINGS

Appearances: Warren A. Taylor, Esq., and William Taylor, Esq., of Fairbanks, Alaska, attorneys for plaintiffs. Charles E. Cole, Esq., of Fairbanks, Alaska, attorney for defendant.

Before: Hon. Vernon D. Forbes, District Judge, and a Jury.

Date: October 14, 1957.

Place: Fairbanks, Alaska. [1]\*

Be It Remembered, that upon the 14th, 15th, 16th, and 17th days of October, 1957, the above-entitled cause came on regularly for trial, the plaintiffs Nick Kupoff and James Zukoev appearing in person and by their attorney of record above named; the defendant appearing by her attorney of

---

\* Page numbers appearing at top of page of Reporter's Transcript of Record.

record above named; the Honorable Vernon D. Forbes, District Judge, presiding.

The Court: In Civil Cause 5395, Kupoff v. Stepovich, are the parties and counsel ready to proceed?

Mr. Taylor: The plaintiffs are ready, your Honor.

Mr. Cole: The defendant is ready, your Honor.

The Court: Very well. The Clerk at this time will please call the names of twelve jurors for the box.

Thereupon, a jury was duly called, examined, and sworn to try the issues in the above-entitled cause; the attorneys made their opening statements to the Court and the Jury; and the following proceedings were had.

The Court: Members of the jury, while you have not yet heard any evidence in connection with lawsuit, you have been sworn to try the case, and I admonish you not to discuss the subject matter of this trial with anyone nor among yourselves. This case will be recessed until two o'clock.

(Thereupon a recess was taken from 12:00 noon until 2:00 p.m.)

Clerk of Court: Court is reconvened.

The Court: Will the Clerk please call the roll of the jury.

Clerk of Court: (After calling roll) They are all present.

The Court: Are you ready to proceed, Mr. Taylor? [4]

Mr. Taylor: If the Court please, I would like to call Mr. Kupoff as our first witness.



NICK KUPOFF

one of the plaintiffs, took the stand as a witness in his own behalf, and after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Taylor): Will you state your name, please?      A. Nick Kupoff.

Q. And where do you reside, Mr. Kupoff?

A. I live up here.

Q. How long have you lived in or around Fairbanks?      A. Oh, fifteen years.

Q. How long?      A. Fifteen.

Q. Fifty years?      A. Fifteen.

Q. Fifteen, and where did you reside before you came to Fairbanks?

A. Well, I was down in Juneau and different places on trips.

Q. How long have you been in Alaska?

A. Since 1916, on and off.

Q. What has been your occupation while you have been in Alaska, Mr. Kupoff?

A. Well, I have been mining, all the way through. [5]

Q. What type of mining?

A. Both. I work for people on quartz mines and work for people on placer mines, and in late years I worked for myself most of the time.

Q. When did you first mine in the Fairbanks district?

A. 1936, that is, I worked for somebody in placer mines.

Q. And where were you working at that time?

(Testimony of Nick Kupoff.)

A. Sourdough Creek, they call it, for Zimmerman.

Q. And do you know Mr. Zukoev?

A. Yes.

Q. How long have you known him?

A. Oh, I have known him since we was kids back in——

Q. Since what?      A. Since we was kids.

Q. You knew him in the old country?

A. Yes.

Q. And you have known him for quite a while in Alaska, then?

A. Oh, yes, when I come to Fairbanks in '36.

Q. And were you ever associated with Mr. Jimmy Zukoev in any mining venture?

A. Yes, on Fish Creek.

Q. And what was the name of the claim, if it had any?      A. Eastern Star.

Q. And who did that claim belong to?

A. Mike Stepovich. [6]

Q. You say you and Mr. Zukoev mined on that particular claim?      A. Yes.

Q. And what authority did you have to mine on there?      A. Well, we had the lease.

Q. Was it just you and Jimmy Zukoev on that lease?

A. No, there was a man, Paul Drazenovich, who was third party.

A. So were all three of you on the lease as lessees?      A. Yes, sir.

(Testimony of Nick Kupoff.)

Q. And Mr. Stepovich was the lessor, is that right?      A. Yes, sir.

Mr. Taylor: If the Court please, this has already an identification 1 and Exhibit A mark on it. I suppose this should be crossed out and re-identified.

The Court: That is correct.

Mr. Taylor: Unless Mr. Cole would want to stipulate that that is——

The Court: You might show it to Mr. Cole after it has been identified.

Mr. Taylor: Yes, sir.

Clerk of Court: Plaintiffs' Identification No. 1.

(Lease between plaintiffs and Mike Stepovich was marked Plaintiffs' Identification No. 1.) [7]

Q. (By Mr. Taylor): Now, Mr. Kupoff, I will hand you Plaintiffs' Identification No. 1 and ask you to examine that instrument, together with the signatures, and after you have examined that, state, if you can, what that purports to be.

Mr. Cole: Your Honor, I object to the question, to state what it purports to be. That is entirely irrelevant. It is only a question of what it is.

The Court: I think that is technically correct. After examining it, he can state what it is.

Mr. Taylor: If he knows.

A. This is the lease between Mike Stepovich and the three men, lessees.

Q. (By Mr. Taylor): Between you, Jimmy, and Paul?      A. Yes, and Mike Stepovich.

Mr. Taylor: If the Court please, we would now

(Testimony of Nick Kupoff.)

like to have that introduced in evidence as Plaintiffs' Exhibit A.

Mr. Cole: The defendant has no objection to its admission in to evidence, your Honor.

The Court: Very well, it will be received.

(The lease, previously marked Plaintiffs' Identification, was received in evidence as Plaintiffs' Exhibit A.)

Mr. Taylor: If the Court please, to save time now, I will reserve the reading of this lease to the jury at the present time. [8]

The Court: You mean that you may want to read it aloud to the jury?

Mr. Taylor: Yes, parts of it, yes, your Honor.

The Court: It is admitted in evidence, and the jury may see it.

Mr. Taylor: Probably you would like to take a look at the signatures at the bottom of the instrument (handing exhibit to the jury). You can just pass it along. The jury will have that in the jury room.

The Court: Yes, indeed, unless it should be subsequently stricken.

Mr. Taylor: Yes, your Honor.

Q. (By Mr. Taylor): Mr. Kupoff, what type of mining ground was the claim mentioned in the lease?

A. Well, it was what we call underground mine, placer gold.

Q. How did you get the gravel and its gold contents from underground?

(Testimony of Nick Kupoff.)

A. Well, they got to sink a shaft, in other words, a hole down to bed rock, and dig out the gravel with the gold contents and hoist it up with a hoist, dump it into the boxes and sluice it with water.

Q. After this lease was executed, I believe the 13th day of February, 1942, what did you and Mr. Zukoev and Mr. Drazenovich [9] do, then, towards carrying out the terms of this lease?

A. We went out the 22nd of February.

Q. And what preparations, if any, did you make before you went out to Fish Creek?

A. We arranged for supplies and bought groceries, we bought rails, what we thought we would use.

Q. What kind of rails?                      A. Car rails.

Q. Yes.

A. And groceries that we bought and we went out and stayed overnight, walked down with snow shoes and stayed overnight and got a cat to plow the road and when the supplies came out, hauled them down and started working.

Q. How did you go out to the Eastern Star Claim on Fish Creek from Fairbanks?

A. We walked in.

Q. From Fairbanks?

A. Yes, we walked out, the mouth of Fairbanks Creek.

Q. And how far did you walk in to the Eastern Star claim?                      A. About three miles.

Q. About three miles?

A. Or four miles, I didn't measure.

(Testimony of Nick Kupoff.)

Q. Did just you and Mr. Drazenovich and Mr. Zukoev go there at that time? A. Yes. [10]

Q. Did you later have some employees?

A. Well, I don't know how many days it was between, but as soon as we set up the camp we had a couple men went out there.

Q. You say that you had to walk in that three miles. Why was it you had to walk?

A. Well, there wasn't no transportation, a car couldn't go through there.

Q. Why couldn't the cars go there?

A. There was no road for it.

Q. There was no road to the Eastern Star Mine?

A. No, not nothing but cats. A cat could go over, but no cars.

Q. And snow plows?

A. Yes, we plowed the snow with a cat tractor.

Q. You said you went in there and got a cat. Whose cat did you use?

A. Well, one we had on the lease.

Q. How much snow was there on the ground at that time, Nick?

A. I should judge three feet or so.

Q. And after you got there, what in the way of buildings and equipment was there on the ground?

A. Well, there was tool sheds, but there was old log house, there was another house there and we evened it up.

Q. Did you have a cook house?

A. Yes, one old log house supposed to be a cook house, yes. [11]

(Testimony of Nick Kupoff.)

Q. And then what machinery, if any, was on the property?

A. Well, there was steam boilers, two boilers, and a hoist and cables.

Q. Cables?

A. Cables was necessary for the hoist and get it out of the mine.

Q. And these steam boilers, what did they use for fuel?      A. Wood.

Q. Wood, and what were these steam boilers used for, Nick?

A. Thaw the ground underground and drive what they call the points into ground and give them the steam and thaw the dirt so you can pick, and the other part was hoisting the dirt out of the holes, they use steam power for that.

Q. A steam hoist?      A. Yes.

Q. And then part of the steam was for thawing the ice?      A. The ice and gravel.

Q. And frozen ground?      A. Yes.

Q. Was the ground underneath, below, down in the drift, was that all frozen?

A. Yes, it was frozen solid.

Q. You say—first, where was this hoist located that you had there?

A. Well, it was located, I would say, 30 feet from the [12] shaft.

Q. Thirty feet from the shaft?      A. Yes.

Q. And what was the dimensions of this shaft, how wide and how long was it?

A. Eight by eight.

(Testimony of Nick Kupoff.)

Q. And how deep was it to the bottom of that shaft?

A. I didn't measure it, but I heard it was 75 feet and when I come, why, I think it was 93.

Q. Ninety-three feet. Would that be on bed rock, then?

A. Yes, it would be a little bit below the bed rock, even.

Q. When you arrived at the claims, what was the condition of that shaft, Nick?

A. Almost full of ice and sloughings.

Q. What?

A. Sloughings, dirt and stuff in the bottom.

Q. And then what did you do in regard to this shaft?

A. Well, we cleaned it, dig ice, and dig the dirt out, so we can get down to the bottom.

Q. Was that shaft timbered? A. Yes.

Q. And at the time that you were cleaning out this shaft, had your hired men come out?

A. Yes, there was two men we hired by that time.

Q. And how long did it take you to sink that shaft—to clean that shaft out? [13]

A. Well, I don't know exactly, but somewhere around 25 days, a month.

Q. And then after you got down to bedrock, what did you find down there?

A. Well, there was the same thing, frozen spots, some places solid.

Q. No, I mean were there any drifts or anything



(Testimony of Nick Kupoff.)

leading from the bottom of this shaft in any other direction?

A. Yes, there was three different drifts, two short shafts, the other one, one way, that was longest.

Q. And the one way, is that the direction that you wanted to go?

A. The one that was longest was the direction that we figured.

Q. And what did you have to do with that drift, Mr. Kupoff?

A. The same as we done in the shaft, clean it, pick ice, pick rocks, timber it wherever it is necessary.

Q. What, if anything, did you do in the drift when you left the shaft, at the bottom of the shaft, and you were in the drift, what condition did you find that drift in that you followed?

A. Well, it was in good shape outside of full of ice and stuff, but then there was timber part-way that was sloughing, you know, rocks dropping, dirt come down. We had to clean the [14] timber to make it safe to go through.

Q. By cleaning it, what do you mean, Nick?

A. Well, take ice out, pick the rocks, pick whatever gravel come down from the ceiling, and if you can't pick it you have to steam it to pick it, and get them out of there, hoist them out, dump them out.

Q. And then how far did you find that that drift extended?

(Testimony of Nick Kupoff.)

A. Well, somewhere around 60 to 80 feet, I don't know the exact number of footage.

Q. And then when you got into that sixty or eighty feet, cleaning that up, what did you then proceed to do?

A. Well, when we hit the face, we started steaming it and going ahead with it.

Q. By "going ahead" what do you mean, Nick? When you steamed it, what did you do?

A. Well, we drive the pipes—I explain all that to the people who don't know what the term is—drive the pipes and connect the steam on it, and leave the steam on slow for hours, then your ground is thawed and you can pick it with pick and shovel.

Q. Then after you picked that ground and got it down, what did you do with it?

A. Then we haul it out in the bucket and hoist them up.

Q. This bucket, what do you mean by that bucket?      A. Well, the hoist bucket.

Q. And how did you haul this debris and the dirt and [15] stuff from where you thawed it to the shaft?

A. We had a car going on the rails.

Q. You had rails, there were iron rails and a car?      A. Iron rails and a car.

Q. Was that just a regular mine car?

A. Yes.

The Court: Mr. Taylor, do you suppose you can

(Testimony of Nick Kupoff.)

explain by the witness what "drift" is. I am wondering if that is just a horizontal tunnel.

Mr. Taylor: Yes.

Q. (By Mr. Taylor): Would you just explain to the Court and jury, Nick——

A. Well, a drift is if we go straight on the floor, that is drift. If you go down hill, it is soft.

Q. You sink a shaft and drive a drift; is that right? A. Yes, that's it.

The Court: Very well.

Q. (By Mr. Taylor): So, then, when you went ahead on that drift, you say thawing with steam pipe, do you know, Nick, in what direction you were going?

A. Well, I think it is east, but whether it was east or north, we were supposed to go toward the pay dirt.

Q. And did you deviate in any way from going east or towards the pay dirt? By "deviate" I mean did you change your [16] direction?

A. Yes, we did. Mike come down one day and he wanted to go right. He claimed there was four and a half foot—four and a half dollars a foot ground, that's square foot value supposed to be four and a half, and we went in there about forty feet, and as far as we could see it didn't pay so we keep on going all directions.

Q. Did you find any indications when you drove in the forty feet as to whether it had been prospected at that particular place in any way?

A. A drill hole, that's all that was.

(Testimony of Nick Kupoff.)

Q. So then when you got there to that drill hole and found nothing, what did you do then, Nick?

A. Well, we come back and keep on going our first direction. I say that we going uphill.

Q. Uphill, you say? A. Yes.

Q. Where the bedrock started to slope up?

A. Well, bedrock very little, but the surface was sloping up.

Q. And do you know what depth you were at that time, Nick, when you were at that drill hole where you had deviated from your general direction?

A. Well, it could be 75 or 48, I don't remember the drill hole numbers. [17]

Q. Then, when you abandoned that, you say you went ahead towards where you thought the pay streak was? A. Yes, sir.

Q. And approximately, Nick, how many feet on this drift did you drive towards where you thought the pay streak was?

A. Well, from there on I think it must have been 175 feet, roughly.

Q. And then what were you doing with the dirt and gravel that you were removing when you were running that drift, Nick?

A. Well, we take them up and sluice it, wash it through the sluice boxes.

Q. Now, did you make any clean-ups during that time?

A. Yes, we have some small clean-ups, dirt that we take out while we were driving the drift.

(Testimony of Nick Kupoff.)

Q. Do you know how much those clean-ups were, Nick?

A. I think eleven hundred was one and twelve hundred something, I don't remember exactly the dollars but——

Q. How many were they?

A. Two clean-ups—three.

Q. Three clean-ups?

A. One eleven hundred, one twelve hundred, the other one was eleven hundred something, too.

Q. And you were just running that, were you not—were you just running that dirt through for the fact that if there was [18] anything in it you could recover?      A. Yes, sir.

Mr. Cole: Your Honor, that is a leading question. I move the answer be stricken.

The Court: I will permit it to stand.

Mr. Taylor: Now, I believe, for convenience, I am going to call this witness "Nick" and the other one "Jimmy". It is confusing when I use the words Zupoff and Zukoev.

The Court: I see nothing to calling the witness "Nick," if he doesn't object to it.

Q. (By Mr. Taylor): Now did you later, Nick, after you got working in these drifts, did you have any more men employed?

A. Yes, we have three or four men there.

Q. And during all your operations there, could you state how many men that you had?

A. Well, anywhere from two to seven men at different times. I couldn't date them but——

(Testimony of Nick Kupoff.)

Q. Also did the membership in the partnership change any time during the operations, Nick?

A. Yes, they was change.

Q. And in what way?

A. Paul, he have something in his mind and he transfer his right to Jimmy Zukoev and myself.

Q. And by "Paul" do you mean Paul Drazenovich? [19]

A. Paul Drazenovich.

Q. And will you state whether or not any new partners were taken in?

A. Yes, later on we take in two new partners.

Q. And what were their names?

A. Nick Kobak and Mike Kitoff.

Q. And do you know when they entered the partnership?

A. Well, in July sometime. I couldn't date it exactly.

Mr. Taylor: I would like to have that marked for identification, please.

Clerk of Court: Plaintiffs' Identification No. 2.

(Assignment of partnership interest to Mike Kitoff was marked Plaintiffs' Identification No. 2.)

Mr. Taylor: And also this one.

Clerk of Court: Plaintiffs' Identification No. 3.

(Assignment of partnership interest to Nick Kobak was marked Plaintiffs' Identification No. 3.)

Q. (By Mr. Taylor): Now, Nick, I will hand you Plaintiffs' Identification No. 2 and ask you to examine that and state, if you can, what it is.

(Testimony of Nick Kupoff.)

A. This is when Mike Kitoff came in as a partner.

Q. When he secured an interest in it?

A. Yes.

Mr. Taylor: If the Court please, we would like to have [20] that Plaintiffs' Identification 2 admitted in evidence as Exhibit B.

Q. (By Mr. Taylor): And I will hand you, Nick, Plaintiffs' Identification 3 and ask you to examine that and——

Mr. Cole: Your Honor, may I have an opportunity to read this before he continues, because it is rather confusing.

Mr. Taylor: I will give you two of them here. Let me get this one in and then you can take a look at both of them.

The Court: You might wait just a minute and let Mr. Cole examine Identification 2 that you handed him a moment ago. Let him examine it.

Mr. Taylor: Mr. Cole has Identification 2.

The Court: Yes, and we will wait until he examines it.

Mr. Cole: I have no objection to its admission, your Honor, except that I can't see the relevancy of it, Mr. Kitoff's being in the partnership. If they are deceased and their estates are parties to this action, but——

The Court: Very well, it will be received.

Clerk of Court: Exhibit B. Identification No. 2 is Plaintiffs' Exhibit B.

(The assignment of partnership interest to

(Testimony of Nick Kupoff.)

Mike Kitoff, previously marked Plaintiffs' Identification 2, was received in evidence as Plaintiffs' Exhibit B.)

Q. (By Mr. Taylor): Now, Nick, you examined Plaintiffs' Identification No. [21] 3. Will you state what that is?

A. That's Nick Kobak's, when he comes in as a partner, the same as Mike.

Mr. Taylor: If the Court please, we would like to offer that in evidence as Plaintiffs' Exhibit C.

The Court: We will give Mr. Cole an opportunity to examine it.

Mr. Taylor: Yes, sir.

Mr. Cole: I have no objection, with the same comment.

The Court: I would like to see it, please.

Mr. Cole: Yes, your Honor.

The Court: It will be received.

Clerk of Court: Exhibit C.

(The assignment of partnership interest to Nick Kobak, previously marked Plaintiffs' Identification 3, was received in evidence as Plaintiffs' Exhibit C.)

Mr. Taylor: I would like at this time to have this marked for identification.

Clerk of Court: Plaintiffs' Identification No. 4.

(Time book for hired help was marked Plaintiffs' Identification No. 4.)

Q. (By Mr. Taylor): Now, Mr. Kupoff, I want to hand you Plaintiffs' Identification No. 4. Will you examine that?



(Testimony of Nick Kupoff.)

A. I don't think I need glasses for that. That's my own time book, when I keep the time. [22]

Q. And were the entries in there made by you, Nick?      A. Yes.

Q. That is your time book?      A. Yes.

Mr. Taylor: If the Court please, that is the time book of——

Q. (By Mr. Taylor): Just a moment, is that the time book of all the men?

A. All the men working there.

Q. Including the partners?

A. Yes, it should be all there. I think I have another book for the partners.

Mr. Taylor: If the Court please, we would like to offer this in evidence.

Q. (By Mr. Taylor): I want you to examine this, though, Nick, and see if the partners are entered in there, in that book.

A. No, there's no partners. Just the people we hired.

Q. That's your employees, only?      A. Yes.

Mr. Taylor: If the Court please, I would like to offer that in evidence as Plaintiffs' Exhibit D.

Mr. Cole: We object to this, your Honor, on the grounds that it doesn't appear any more than inferentially that this was a time book made by this witness in this operation.

The Court: If your objection is that there is no proper foundation [23] laid for the introduction—is that it?

Mr. Cole: In substance, I suppose.

(Testimony of Nick Kupoff.)

The Court: I mean, I must sustain that objection, if that is your objection.

Mr. Cole: That is my objection.

The Court: It must require a showing as to who made the entries in the book and when they were made.

Mr. Taylor: Yes.

Q. (By Mr. Taylor): Mr. Kupoff, calling your attention to the entries made in this book, purporting to be the pay periods——

Mr. Cole: I object to that, Your Honor, on the grounds that Mr. Taylor can't testify what it purports to be.

Mr. Taylor: I am not trying to testify. I am only asking him a question as to what it purports to be.

Mr. Cole: He never said it purported to be that.

The Court: And, of course, the question is leading and suggestive. Let the witness testify as to the identification.

Q. (By Mr. Taylor): Mr. Kupoff, then, you take a look at this and then you tell me what those entries are, who made them, and when they were made, and what they were in relation to.

A. They were February 22 to 28, that's a week. There is——

Q. Just generally state, Nick, what they are.

A. There is Leo Koppa, cook. [24]

Q. Now, don't read them, Nick. Just what each one of those double pages is.

A. Well, monthly, weekly, each man, how many

(Testimony of Nick Kupoff.)

hours they work. I didn't put it by hours but by day. They worked ten hours, and their name is there, and the date, week they worked, their name is there, all here, if you want me to read it. That's the way I kept them all the way through.

Q. And who made those entries in there, Nick?

A. What do you mean?

Q. Who put the writings down? Who marked the time?

A. All these writings are my writings.

Q. When were they made?

A. Each page has got a date here. They were made in the spring of 1942.

Q. And you say that—were those entries made daily?

A. Yes, every day I marked their time, if that is what you mean "entries."

Q. You say those were employees. What job were they on at that time?

A. Well, they was working in the mine, cleaning or hauling wood in the early part of the spring.

Q. And that is the mine that you have been testifying to, the mine that was owned by Mr. Stepovich?

A. That's right.

Q. So they were all made by you in the course of the business [25] at the time that they occurred; is that right?

A. That's right. They worked and I marked their time every day in the week.

Mr. Taylor: If the Court please, I would like to re-offer it as showing—I think all the objec-

(Testimony of Nick Kupoff.)

tions made by Mr. Cole have been met. They were made in the course of business by the witness and were a daily record.

The Court: Do you have any objection, Mr. Cole?

Mr. Cole: I haven't had an opportunity to inspect it yet, your Honor.

The Court: You may do so now. Just one moment, please.

(Mr. Cole examined the proposed exhibit.)

Mr. Cole: We have no objection.

The Court: Very well, it will be received.

Clerk of Court: Exhibit D.

(The time book for hired help, previously marked Plaintiffs' Identification No. 4, was received in evidence and marked Plaintiffs' Exhibit D.)

Mr. Taylor: I would like to have this marked for identification, please.

Clerk of Court: Plaintiffs' Identification No. 5.

Mr. Taylor: Perhaps, your Honor, one of these is a continuation of the other, and I would suggest that we designate that Identification 5-A and 5-B. The other one would be 5-B.

The Court: You have two there?

Mr. Taylor: There are two. One goes up to the middle of [26] July, and then the other is a continuation that takes it up to the 22nd of August.

The Court: I see no objection to marking them 5-A and 5-B.

Mr. Cole: Your Honor,—

(Testimony of Nick Kupoff.)

The Court: Yes.

Mr. Cole: —just this problem, when we transpose these to alphabetical enumerations that we are going to have to shift back into, when we make them “A” and “B”—it seems to me it would be easier to just make them 6 and 7, or 5 and 6.

Mr. Taylor: They are all one thing.

The Court: I don't see any problem either way. There is a possibility, of course, one may be admitted and not the other.

Mr. Taylor: There would be no possibility of that, your Honor.

The Court: I know there is that possibility.

You are asking that these be identified, as I understand your statement, Mr. Taylor, Identification 5-A and Identification 5-B.

Mr. Taylor: Yes.

The Court: They may be so identified. The numerals go to the identification and the alphabet to the exhibit, so I think we will have no difficulty.

Mr. Cole: Then, if they are admitted, they will be E-1 and E-2, is that it?

Mr. Taylor: That is right. [27]

(Time book, week ending Feb. 28, 1942, through week ending July 18, 1942, was marked Plaintiffs' Identification No. 5-A.)

(Time book, week ending July 25, 1942, through week ending August 22, 1942, was marked Plaintiffs' Identification No. 5-B.)

Q. (By Mr. Taylor): Now, Mr. Kupoff, I now

(Testimony of Nick Kupoff.)

hand you Plaintiffs' Identification 5-A and have you examine that and ask you to state what it is.

A. This is the—one of my bookkeepers, Ray Kohler and Bolet, they take care of my bookkeeping and that's their writing, their time book.

Q. Then, they broke it down and segregated it as to the social security, and other things?

A. Yes, I would think they go regular procedure and take the tax out and social security and all.

Q. Those books, then, would show the total amount of money paid out for wages?

A. Yes, they are all paid.

Mr. Taylor: If the Court please, would the Court like to look at this and examine it?

The Court: Well, the witness hasn't looked at this yet, has he?

Mr. Taylor: Yes, I think he looked at both of them. They are both the same, your Honor. One just has a couple weeks' entries in it. I will get the other one. [28]

The Court: You might show it to Mr. Cole.

(Mr. Taylor handed the record book to Mr. Cole.)

Mr. Cole: The defendant objects to these, your Honor, on the ground that they are hearsay. It doesn't appear that this witness made those entries in those books; therefore, we don't have any idea as to their veracity or their reliability.

The Court: I don't think there is sufficient showing yet by the witness to enable me to receive them, Mr. Taylor.

(Testimony of Nick Kupoff.)

Q. (By Mr. Taylor): Mr. Kupoff, you stated that these were made from the time book that you submitted to Mr. Bolet, of Bolet and Kohler?

A. Yes, sir; that's right.

Q. And that the hours shown upon them were actually the hours that the men worked and would show as reflected from your time book?

A. That's right.

Q. And were the wages shown in these the wages which you were paying the men?

A. That's right.

Q. And was the time worked the same as the time that shows in your time book?

A. Yes, that's right. Bolet copied out of my book every week so that he can keep the books.

Q. And then they would make the distribution for overtime and other things? [29]

A. Oh, yes.

Q. And you saw these every week, did you, Mr. Kupoff?

A. I used to see them not every week but sometimes I had to buy some stuff, and leave my book and she copy, and I come back and get my book and saw how it works.

Q. And you know that these are correct and based upon your time book?

A. That's right, for sure.

The Court: Are you re-offering them now?

Mr. Taylor: Yes, your Honor.

The Court: Mr. Cole?

(Testimony of Nick Kupoff.)

Mr. Cole: The defendant objects to these on the same ground, that we don't know where Bolet is. We actually don't know the records from which he made the entries which appear in this book, and unless that appears, it's nothing but pure hearsay, and we have no idea as to how he performed the calculations other than this witness' testimony that he saw the records, but we don't know what records or books, where they came from, how he did it, how he performed his calculations, and we don't know whether Bolet made these entries or Ray Kohler made the entries, and therefore the defendant objects on the ground that they are hearsay. They haven't been shown to be records made in the ordinary course of business.

The Court: I think it would require a good deal of speculation on my part to know who actually made the entries, whether the [30] person was employed by the partnership or whether they were made during the course of the work. I don't think it is sufficiently spelled out. I feel that under the present state of the record, I must sustain the objection.

Q. (By Mr. Taylor): Mr. Kupoff, were those records in Plaintiffs' Identification 5-A and 5-B made at your direction? A. Yes.

Q. And what was it made from?

A. Well, it was made from my time what I kept, peoples working out there, keep their time, and I told Mrs. Bolet to keep a book, and she get that book and started to weekly figure it up.



(Testimony of Nick Kupoff.)

Q. That was the firm of Bolet and Kohler, was it?  
A. That's right.

Q. And did you check these, did you check this book against your time book when they were given back to you?

A. Well, I never got them. They keep them down at the office.

Mr. Taylor: Your Honor, I feel that the objection of the defendant is not well taken, in view of the fact that this was made at the direction of Mr. Kupoff and it must be in conformity with the time book, and all it was was a segregation showing social security, made at his instructions to his bookkeeper. The original entry in the time book, your Honor, was in this witness' [31] own handwriting.

The Court: Well, I think that the foundation is very weak as to who—just assuming that these persons named were accountants or something or other—I don't recall any testimony as to what services they performed, when it was done, but I feel that at this time, while I doubt that the foundation is very substantial, I am going to admit Identifications 5-A and B.

Clerk of Court: 5-A is Exhibit E-1 and 5-B is Exhibit E-2.

(The two record books previously marked Plaintiffs' Identifications 5-A and 5-B were received in evidence as Plaintiffs' Exhibits E-1 and E-2, respectively.)

(Testimony of Nick Kupoff.)

Mr. Taylor: Maybe this time, your Honor, would be the proper time to take the customary recess.

The Court: Very well. I might state that I wouldn't have admitted Identifications 5-A and 5-B had it not been for the foundation of Exhibit D, which I am sure you will have an opportunity to check.

Mr. Cole: Your Honor, may I make a remark in that connection?

The Court: Yes.

Mr. Cole: I just would like to make two points in connection with it. First, that book, Exhibit D, doesn't show actually the amount of time, just a mark in there. Secondly, it occurs to me that it make no difference whether they were directed to do something or not. That is entirely irrelevant.

The Court: The question is whether they did it.

Mr. Cole: Yes.

The Court: Members of the jury, please heed the admonition I previously gave to you, and before taking the recess, what time do you have, Mr. Taylor?

Mr. Taylor: It is just directly three o'clock according to my time.

The Court: Mr. Hall, what do you have?

Clerk of Court: I have ten after, your Honor.

The Court: I am going to set mine to five past regardless of what time it is now, and let's synchronize our watches.

We will now take a ten-minute recess.

(Testimony of Nick Kupoff.)

Clerk of Court: Court is recessed for ten minutes.

(Thereupon a ten-minute recess was taken.)

Clerk of Court: Court is reconvened.

The Court: Do the parties wish the roll call of the jury?

Mr. Cole: The defendant waives it.

Mr. Taylor: We will stipulate that the jury are all present, your Honor, including the alternate.

The Court: You may proceed.

Q. (By Mr. Taylor): Now, Mr. Kupoff, going back to the start of your partnership, would you state whether or not the three original partners made any contribution to the capital assets?

A. Yes, we did. We put in \$250 apiece to start.

Q. That would be you and Jimmy and Paul?

A. Yes, sir.

Q. Now, did you and your other partners, Mr. Kupoff, have any agreement as to the wages which were allowed the partners?

A. Well, we had agreement that if we make a success we supposed to get ten dollars a day each day we work, this going into the company's account.

Q. What hours did you and your partners work, Mr. Kupoff? Did you keep any record of that?

A. Well, we worked ten hours, every day ten hours.

Q. That was ten hours per day?

A. Ten hours a day.

(Testimony of Nick Kupoff.)

Q. And how many days a week?

A. Seven days a week.

Q. And from the time that you commenced the partnership on February 22, 1942, to the 22nd of August, 1942, how many days did you miss work?

A. Well, it's six months all over, and I don't remember the exact dates, and I never missed a day.

Q. Never missed a day from the time you went up?

A. I was there every day.

Q. According to the time shown on this time book, Nick, how many hours a day—you have checked each day—but how many hours a day did your employees work?

A. They worked ten hours, and if they worked less than ten hours, I would have put the numbers, but I just put one mark [34] as a day.

Q. Then, how were they paid in regard to overtime?

A. Well, after forty hours a week the book-keeper figure out so much for overtime and so much for the regular wage.

Q. And I take it, then, from your answer to that question, that the overtime is broken down upon Plaintiffs' Exhibit E-1 and E-2; is that right?

A. Yes, it is the figure that shows there, is for the men.

Q. Now, Nick, you have kind of given us a description of what you have—what a drift is, a shaft, and other matters pertaining to the mine,

(Testimony of Nick Kupoff.)

but I don't believe that I asked you to describe what a clean-up is.

A. A clean-up is when you put gravel through the box, we call it sluice boxes, and the coarse pieces, we call them riffles. The gravel goes over those riffles, and the gold settles in the riffles. Then we take it up and clean up the gold. That is what clean-up is.

Q. What do you do first before you clean up the gold?

A. We put water in the box and put the gravel.

Q. Do you leave the water run while you are cleaning up?

A. No. No, we slow the water down to almost nothing, when we clean up, and take the riffles up, then we gather the gravel what is left there and take a whiskbroom, we call it, and work it to separate your gold out.

Q. During the summer, then, you say you had three such [35] clean-ups; is that right?

A. Yes.

Q. I believe you testified, Mr. Kupoff, that you bought supplies and material to take out to the place, and I will just ask you if during the summer you did purchase supplies from the merchants in town for your use out there. A. Yes.

Mr. Taylor: These are certain checks, your Honor. I would like to have them marked for identification. Possibly to save time we could designate them as one identification.

The Court: You can try it. Is that 6?

(Testimony of Nick Kupoff.)

Clerk of Court: Yes, sir, that is Identification No. 6. The checks are numbered Plaintiffs' Identification No. 6.

(The envelope with checks was marked Plaintiffs' Identification No. 6.)

Q. (By Mr. Taylor): Now, Nick, I will hand you a number of checks which are marked for identification as Plaintiffs' Identification No. 6, and ask you to examine those papers and state to the jury, if you can, what they are.

A. Well, do you want me to read the names, what they are for?

Q. No, just look them over and then when you get through just state what they are, who drew them, and what they were drawn for, not each particular item, but on whose account.

A. Well, this is canceled checks from the bank with name [36] under the North Star Mining Company. It is my own signature on it, pay to whoever or whatever it was to, supplies or wages or whatever was necessary.

Mr. Taylor: If the Court please, I would like to offer those in evidence as Plaintiffs' Exhibit F.

Mr. Cole: Your Honor, the defendant objects unless it is shown that these checks were expenses and connected with the operation of this mine.

The Court: That is correct, it must be so shown before they are admissible.

Mr. Taylor: I thought he had already testified to that, your Honor. North Star Mining Company, he said that was the——

(Testimony of Nick Kupoff.)

The Court: As I recall, the Eastern Star is the mining company.

Mr. Taylor: The Eastern Star, your Honor, is the name——

The Court: Claim.

Mr. Taylor: ——of the claim. The operating company was the North Star Mining Company that was operating it.

The Court: Where does that appear in the evidence?

Mr. Taylor: It appears in the title of the case, your Honor.

The Court: Well, you can have the witness show, if you are able, for what mining project the checks were issued.

Q. (By Mr. Taylor): At the time that those checks were written, Nick, what [37] or when and where was the North Star Mining Company operating?

A. Well, it was on the Eastern Star Claim on Fish Creek.

Q. Was that the claim that was owned by Mike Stepovich at that time?      A. Yes, sir.

Q. And was that claim the same claim that is the subject matter of this suit?

A. Yes, sir.

Mr. Taylor: I re-offer them, your Honor.

Mr. Cole: Same objection, your Honor.

The Court: I think you should spell out what item it is that each of the checks was in connection with the operation of the Eastern Star.

(Testimony of Nick Kupoff.)

Q. (By Mr. Taylor): Were all of these checks, Mr. Kupoff, issued in connection with and in payment of accounts of the North Star Mining Company? A. Yes, sir.

Q. Were they issued on the dates that these checks—on the date that shows on the check?

A. Yes, sir.

Q. And Paul Drazenovich, when he was a partner, was he authorized to sign checks?

A. Yes, that's his signature showing on some checks there at the end. [38]

Mr. Taylor: I re-offer them, your Honor.

Mr. Cole: Same objection, your Honor, but if Mr. Taylor will show that these checks were issued in payment of expenses incurred by the North Star Mining Company in the operation of the Eastern Star Mining venture in 1942, then I will have no objection but until he shows that they were in payment of expenses in connection with this mining operation, they are irrelevant.

The Court: Yes, I think Mr. Taylor believes he has shown that, but I don't think you have shown that satisfactorily.

Mr. Taylor: I don't know how I can do any more, your Honor. Every objection that Mr. Cole raised at this time has been satisfactorily shown.

The Court: I feel the objection is still well taken.

Q. (By Mr. Taylor): Now, Mr. Kupoff, were these checks issued by you in payment of expenses of the North Star Mining Company during the time



(Testimony of Nick Kupoff.)

the North Star Mining Company was operating the mine on the Eastern Star Claim which belonged to Mike Stepovich?

A. Yes, sir, it was.

Mr. Taylor: I re-offer them.

The Court: Well, I will permit them to be received.

Clerk of Court: Exhibit F.

(The envelope with checks previously marked Plaintiffs' Identification No. 6 was received in evidence as Plaintiffs' Exhibit F.)

Clerk of Court: Twenty-nine checks.

Mr. Taylor: I would like to have this marked for identification, not the blank checks, just the check stubs.

Clerk of Court: Plaintiffs' Identification No. 7.

(Check stubs in bound check book were marked Plaintiffs' Identification No. 7.)

Q. (By Mr. Taylor): Now, Mr. Kupoff, I will hand you Plaintiffs' Identification No. 7, referring particularly to this part of the identification, and ask you to state—examine those, and state if you can what they are.

A. Well, these are what I call the stubs of the checks out of regular bank book, stubs out of regular bank book, same checks as in exhibit one, even they are same color.

Q. And did you make those? Did you write those?

A. No, sir, the bookkeeper has done that.

Q. The bookkeeper did that. A. Yes.

(Testimony of Nick Kupoff.)

Mr. Taylor: If the Court please, I would like to offer these in evidence as an exhibit, for the reason that two or three checks evidently became lost, that it was the latter part of the making of the checks, and evidently they were not returned to the bank or if they were returned to the bank, why, they were not kept, and for that reason I just would like to introduce these for the purpose of proving that these other checks were issued. It just pieces it out, your Honor. [40]

If counsel would like to check them against the checks, it will show that there were two checks that were issued that we are unable to find.

Mr. Cole: No objection.

The Court: Identification 7 will be received.

Clerk of Court: Exhibit G.

(The check stubs previously marked Plaintiffs' Identification 7 were received in evidence as Plaintiffs' Exhibit G.)

Mr. Taylor: We might be able to save room if maybe we could remove those blank checks.

The Court: They will do no harm.

Q. (By Mr. Taylor): Now, Mr. Kupoff, at any time at the latter part of your operations on Eastern Star Claim, were you approached by Mr. Stepovich in regard to an indebtedness of the partnership?

A. You have to explain that plain what you mean.

Mr. Taylor: I would like to have this marked, re-marked—it has been marked once, but re-marked for this suit.

(Testimony of Nick Kupoff.)

Clerk of Court: Plaintiffs' Identification No. 8.

(Statement dated 8/8/42 from Mike Stepovich was marked Plaintiffs' Identification No. 8.)

Q. (By Mr. Taylor): Now, Mr. Kupoff, I will hand you Plaintiffs' Identification No. 8 and ask you to examine that and state, if you can, to the jury what that document is. [41]

A. Do you want me to read each item or just mention——

Q. No, just a general statement as to what it is.

A. This is a statement, August 8, 1942, which Mike Stepovich made, and I paid before, and the amount is there and his signature is there and everything else.

Mr. Taylor: And I would like to have that introduced in evidence, Your Honor, as Plaintiffs' Exhibit H.

Mr. Cole: No objection, Your Honor.

The Court: It will be received.

Clerk of Court: Exhibit H.

(Statement dated Aug. 8, 1942, from Mike Stepovich, previously marked Plaintiffs' Identification 8, was received in evidence as Plaintiffs' Exhibit H.)

Q. (By Mr. Taylor): Now, just describe, Mr. Kupoff, the various items that you were billed for by Mr. Stepovich—you and your partner?

A. Well, the first item, back royalty \$145.92, wood \$10 a cord and \$6 a cord, \$111. That is three kinds of wood, it shows three places.

(Testimony of Nick Kupoff.)

Q. Just state briefly and the total sum there, Nick.

A. Caterpillar rent under the lease, July payment, \$250. Groceries, inventory what he had there, \$43.03. Royalty, August 2, 1942, clean-up, based on \$27.00 an ounce, 48 ounces,  $33\frac{1}{3}$  percent of \$1,296, \$432.00. Caterpillar, 22, \$45.65.

Waechter Brothers, that was meat market, \$138.34.

The total is \$1,165.94.

Q. And what, if anything, was done by the partnership in connection with that claim, Mr. Kupoff?

A. I didn't get you exactly.

Q. I say: what did the partnership do with regard to that particular claim, that statement he gave you?

A. Well, they authorized me to give him a check and pay for it, that's all.

Q. Mr. Kupoff, I hand you one item of Exhibit F.

A. This is the check made out to Mike Stepovich, the very same amount, August 8, 1942, and made out to Mike Stepovich, eleven hundred and—what is that, two or nine—\$1120.29, and it is signed by myself, North Star Mining Company by my name.

Q. What was that check for, Nick?

A. That was to cover, I don't know what you want to call it, debt between my company and Mike Stepovich.

Mr. Taylor: I overlooked one exhibit here, Your Honor. I would like to have that marked for identification.

(Testimony of Nick Kupoff.)

Clerk of Court: Plaintiff's Identification No. 9.

(Assignment of partnership interest by Paul Drazenovich to Kupoff and Zukoev, was marked Plaintiff's Identification No. 9.)

Q. (By Mr. Taylor): Now, Mr. Kupoff, I hand you Plaintiffs' Identification [43] No. 9 and ask you to glance at that and state if you can what it is.

A. This is, what do you call it—you can call it bill of sale or agreement when Paul Drazenovich moved out of the partnership.

Q. And assigned his interest to you and Mr. Zukoev? A. In North Star Mining Company.

Mr. Taylor: I would like to have that introduced in evidence as Plaintiffs' Exhibit I.

Mr. Cole: No objection, Your Honor.

The Court: It will be received.

Clerk of Court: Exhibit I.

(Assignment of partnership interest by Paul Drazenovich to Kupoff and Zukoev, previously marked Plaintiffs' Identification No. 9 was received in evidence as Plaintiffs' Exhibit I.)

Mr. Taylor: I would like to have that marked for identification, please.

Clerk of Court: Plaintiffs' Identification No. 10.

(The creditor's claim was marked Plaintiffs' Identification No. 10.)

Q. (By Mr. Taylor): Mr. Kupoff, I will hand you Plaintiffs' Identification No. 10 and ask you to take a look at that and state what it is.

(Testimony of Nick Kupoff.)

A. This is one that the Court give the order to close the company.

Q. Look again Nick. Read that. [44]

A. Oh, yes, this is what Mike got through the Court, he got my bills, in other words, pick up what I owe here and here and there so he can get——

Q. Nick—maybe I had better ask him a direct question.

The Court: You may try it.

Q. (By Mr. Taylor): Nick, is this not the creditor's claim you filed in the estate of Mike Stepovich, deceased?

Mr. Cole: I think that is a leading question, Your Honor.

Mr. Taylor: It is a leading question.

The Court: There is no doubt.

Mr. Taylor: I am not making any bones about a leading question now.

What is the answer?

The Court: I will permit the answer.

A. Well, I still can't get that in my head.

Q. (By Mr. Taylor): I asked you if that is the creditor's claim you made against the estate of Mike Stepovich in the sum of \$106,791?

A. Yes. I say "yes."

Mr. Taylor: If the Court please, I——

The Court: Why don't you show it to Mr. Cole? Maybe he should have seen it originally.

(Mr. Taylor handed document to Mr. Cole.)

Mr. Cole : I have no objection, Your Honor. [45]

(Testimony of Nick Kupoff.)

The Court: It will be received.

Clerk of Court: Exhibit J.

(Creditor's claim for \$106,791 filed against estate of Mike Stepovich, previously marked Plaintiffs' Identification No. 10, was received in evidence as Plaintiffs' Exhibit J.)

Q. (By Mr. Taylor): Now, Nick, after you had a settlement with Mike Stepovich in relation to a claim and demand in the sum of \$1,120, what did you then do? It was the settlement on the 8th day of August, 1942.

A. Well, I went back and kept on working.

Q. And now we come back to this working part, Nick. Now, after you had driven off the drift to the right of the way you were going about forty feet and then came back and then you went toward where the pay streak was, how far did you say you then drove the drift?

A. Well, roughly one hundred and sixty or eighty feet from that point.

Q. And what, if anything, did you do while you were driving that drift to test the ground?

A. Well, we take a pan of the dirt——

Q. A pan?

A. It looked like a dish, pan, and put the dirt in and wash them and if it shows any gold, why, the direction it shows better, that is where you dig.

Q. And then how far did you follow that—after you found that indication of pay, how far did you go?

(Testimony of Nick Kupoff.)

A. Like I say, we went about a hundred sixty to eighty feet, I don't know exactly.

Q. And then after you went that one hundred sixty or one hundred eighty feet, what was the result of your pannings after you had reached that distance?

A. It was pretty good panning. It shows better than any other place, so we widened out the face, what we call the face, where the gravel is, instead of digging one hole, we cross cut it and make a face out of it.

Q. And you stated that it showed better there than it had at any other place, Nick.           A. Yes.

Q. Will you state when you opened up this face how you took your samples for panning?

A. The face could be anywhere from four feet to eight feet. It depends on the dirt working down.

Q. How was it at that particular place where you got into this and then you opened up the face?

A. I think it was somewhere around six feet, the pay gravel.

Q. So then when you would take a sample to pan, how would you take that sample?

A. Well, I would take it from top to bottom. [47]

Q. How would you get that sample?

A. Well, you hold your gold pan there and take a pick and keep on picking down to the bottom and you get full face sample.

Q. So in that way it would give a sample clear for that full six feet?           A. That's right.

Q. Was that face frozen?           A. Yes, sir.



(Testimony of Nick Kupoff.)

Q. And what were the results of that panning? What pans would you get?

A. I would say an average of from fifty cents to dollar each pan; however, I don't know the exact penny but——

Q. And to get that average, Nick, were some of them a little low and some of them quite high?

A. Well, that's right.

Q. Now, you say you opened up the face. Just describe what you did when you came to this particular area, what you thought was good ground. Did you drive on through it?

A. No, we, instead of driving ahead, we drove towards the right and towards the left, and that would give us about thirty feet of face there.

Q. Then, any of that thirty feet, you could just start mining that and taking it out; is that right?

A. That's right, we put down the steam pipes there and [48] thawed out, and we could dig it and shovel it out.

Q. How far did you drive on into that face at any one place?

A. Well, I think, I'll say ten or twelve feet.

Q. And how were the values holding up as you went into that ten or twelve feet?

A. Well, as far as I know, holding better——

Q. They were better?

A. ——the further we go.

Q. Do you know approximately what time or the date that you struck that good pay?

A. Well, it was either the last part of July or

(Testimony of Nick Kupoff.)

the first part of August. It was pretty close around there. I don't remember the exact date.

Q. Nick, what is customarily a pan, when you take a pan of dirt, what is it usually equivalent to?

A. A pan of dirt is, all miners figure, take a shovelful of dirt and put it in the pan. That is a No. 2 shovel, not a coal shovel.

Q. Say, you were panning, and you got a fifty-cent pan, that would be fifty cents to a shovelful; is that right?      A. Yes.

Q. And if you got a dollar, it would be a dollar to a shovelful; is that right?

A. That's right. [49]

Q. How many pans, Nick, is it customary to consider to a cubic foot?

A. I think it is seven. I am not sure, but I think it is seven pans to a cubic foot.

Q. And then just carrying out that logic and conclusion, then, it would be seven times twenty-seven pans in a yard of dirt; is that right?

A. Yes.

Q. Now, after you got into that, what you called the pay streak, how much dirt—I will withdraw that question, please.

Now, Nick, after you were operating on this face that you had opened up, do you know approximately how much of that gravel in the pay streak that you removed from its place?

A. Well, I say somewhere around four, five hundred.

(Testimony of Nick Kupoff.)

Q. Then, as you were taking that out of the drift and up to the surface, what were you doing with it?

A. Well, we sometimes, partners after work hours we go down and sluice some of, and then maybe an hour or maybe so we using every night a little water.

Mr. Cole: I didn't hear that last part of that answer please.

The Court: Let's see if the reporter got it.

(Thereupon the reporter read the last answer.)

Q. (By Mr. Taylor): And then after you struck this rich dirt, Mr. Kupoff, [50] did you have any clean-ups?      A. No, sir.

Q. And what was the reason that you did not clean up?

A. Well, the Marshals come out and close us down.

Mr. Taylor: I would like to have this marked for identification, please.

Clerk of Court: Plaintiffs' Identification No. 11.

(Certified copy of summons and complaint, No. 4950, marked Plaintiffs Identification No. 11.)

Q. (By Mr. Taylor): Mr. Kupoff, I hand you Plaintiffs' Identification No. 11 and ask you to look at that and state if you can what it is. It is not very legible. You will have to look close.

The Court: Maybe it is recess time, Mr. Taylor,

(Testimony of Nick Kupoff.)

and I am going to suggest maybe you can go over some of those matters with Mr. Cole.

Mr. Taylor: It is a very poor copy, Your Honor.

The Court: It is recess time now, and maybe you can go through some of your expected documents with Mr. Cole.

Mr. Taylor: Yes, sir.

The Court: So members of the jury, please heed the admonition I previously gave to you, and we will take a ten-minute recess.

Clerk of Court: Court is at recess for ten minutes. [51]

(Thereupon a ten-minute recess was taken.)

Clerk of Court: Court has reconvened.

The Court: Are the parties satisfied that the thirteen jurors are present in the box without a roll call?

Mr. Taylor: Yes, Your Honor, we are.

Mr. Cole: Yes, Your Honor.

The Court: Very well, proceed.

Mr. Taylor: Do you have any objection to this?

Mr. Cole: In the interest of saving time, the defendant will stipulate that Plaintiffs' Identification 11 may be admitted as Exhibit K, and it is a copy of a summons issued in the case of Mike Stepovich v. James Zukoev, et al.

The Court: Very well, it will be received.

Clerk of Court: Exhibit K.

(Certified copy of summons and complaint in Case No. 4950, previously marked Plaintiffs'

(Testimony of Nick Kupoff.)

Identification 11, was received in evidence as Plaintiffs Exhibit K.)

Mr. Cole: I will also stipulate that Identification No. 12 may be admitted as Plaintiffs' Exhibit L.

Clerk of Court: That has no mark of this trial.

The Court: That will be Identification 12, Mr. Hall?

Clerk of Court: That is right, Your Honor. That's the new identification number.

(Copy of writ of attachment in Case No. 4950, was marked Plaintiffs' Identification 12.)

Mr. Cole: That Plaintiffs' Identification 12 may be received [52] as Exhibit L, and it is a copy of a writ of attachment issued in the case of Mike Stepovich v. James Zukoev, et al.

The Court: Very well, it will be received.

Clerk of Court: Plaintiffs' Exhibit L.

(Copy of writ of attachment issued in Case 4950, previously marked Plaintiffs' Identification 12, was received in evidence as Plaintiffs' Exhibit L.)

Clerk of Court: This is Plaintiffs' Identification No. 13.

(Original of memorandum agreement re assuming obligation for indebtedness of North Star Mining Co., was marked Plaintiffs' Identification No. 13.)

Mr. Cole: The defendant will stipulate that Plaintiffs' Identification No. 13 may be admitted into

(Testimony of Nick Kupoff.)

evidence as Plaintiffs' Exhibit M, and that it is an original of a memorandum of agreement executed by Nick Kupoff, and Paul Drazenovich, and in which Mr. Kupoff apparently in behalf of the partnership assumes obligations of the partnership.

The Court: Very well, it will be received.

Clerk of Court: Exhibit M, Plaintiffs' Identification No. 13.

(The memorandum agreement previously marked Plaintiffs' Identification No. 13, was received in evidence as Plaintiffs' Exhibit M.)

Clerk of Court: Plaintiffs' Identification No. 14.

(Original of letter from E. B. Collins, to defendant Kupoff, dated July 24, 1945, was marked Plaintiffs' Identification No. 14.) [53]

Mr. Cole: The defendant will stipulate that Plaintiffs' Identification No. 14 may be admitted into evidence as Plaintiffs' Exhibit N, and that it is an original of letter signed by E. B. Collins, in which it is stated that the claim of James Zukoev, Mike Kitoff, Nick Kobak, co-partners of the North Star Mining partnership against the estate of Mike Stepovich, in the amount of \$106,791.29, has been rejected by the executrix of the estate.

The Court: Very well. It will be received.

Clerk of Court: Exhibit N.

(Letter from E. B. Collins to Kupoff, July 24, 1945, previously marked Plaintiffs' Identification No. 14, was received in evidence as Plaintiffs' Exhibit N.)

(Testimony of Nick Kupoff.)

Mr. Cole: The defendant will stipulate that Plaintiffs' Identification 15 may be introduced into evidence as Plaintiffs' Exhibit O, and that it is a certified copy of a minute order entered in the case of Mike Stepovich v. James Zukoev, et al., which shows that at a hearing held in this Court on November 24, 1942, at which plaintiff was represented by E. B. Collins, and the defendants by Julien A. Hurley, that Mr. Collins moved for a continuance of the trial and the motion for continuance was resisted by Mr. Hurley, and then it was ordered that the motion for a continuance be denied, after which Mr. Collins moved for a voluntary non-suit and it was ordered that the motion be granted and judgment of non-suit entered in the sum of blank dollars [54] to be taxed by the Clerk.

The Court: It will be received.

Clerk of Court: Exhibit O.

(Certified copy of Minute Order in Case No. 4950, marked Plaintiffs' Identification No. 15, was received in evidence as Plaintiffs' Exhibit O.)

Clerk of Court: Plaintiffs' Identification No. 16.

(Marshal's docket sheet, Case No. 4950, was marked Plaintiffs' Identification No. 16.)

Mr. Cole: The defendant will stipulate to the admission into evidence of Plaintiffs' Identification No. 16—well, I think I would like to renege on this stipulation.

(Testimony of Nick Kupoff.)

The Court: Very well.

Mr. Cole: You better introduce that in the proper way.

Clerk of Court: Plaintiffs' Identification No. 17.

(Copy of letter from Mike Stepovich to U. S.

Marshal was marked Plaintiffs' Identification No. 17.)

Mr. Cole: The defendant will stipulate to the admission into evidence of Plaintiffs' Identification No. 17 as Plaintiffs' Exhibit P, and it is a copy of a letter written by Mike Stepovich to the United States Marshal, J. A. McDonald, which reads as follows:

“Re: Mike Stepovich vs. James Zukoev, et al., #4950, District Court

“You are hereby authorized to dispense with the services of a keeper and watchman on the premises under [55] attachment in the above-entitled cause, and I will not hold you responsible for any loss or damages occasioned by not providing a keeper or watchman from this date under said attachment.

“This action is taken for the reason that I do not deem it necessary under the circumstances to incur the costs necessarily involved in the maintenance of a keeper.

“Yours very truly,

“Mike Stepovich

Plaintiff in said action”

It is on the stationery of E. B. Collins, attorney at law, Fairbanks, Alaska.



(Testimony of Nick Kupoff.)

The Court: Very well. It will be received.

Clerk of Court: Exhibit P.

(Letter from Stepovich to U. S. Marshal McDonald, Sept. 15, 1942, previously marked Plaintiffs' Identification 17, was received in evidence as Plaintiffs' Exhibit P.)

Clerk of Court: Identification No. 18.

(Writ of attachment, Case No. 4950, was marked Plaintiffs' Identification No. 18.)

Mr. Cole: The defendant will stipulate to the admission into evidence of Plaintiffs' Identification 18 as Plaintiffs' Exhibit Q, and that it is the original of the writ of attachment issued in the case of Mike Stepovich v. James Zukoev, et al., that attached to it is the original of the Marshal's return on the attachment. [56]

The Court: It will be received.

Clerk of Court: Exhibit Q.

(Writ of attachment, in Case No. 4950, previously marked Plaintiffs' Identification No. 18, was received in evidence as Plaintiffs' Exhibit Q.)

Mr. Cole: Do you have anything further, Mr. Taylor?

Mr. Taylor: No, that is all.

The Court: Well, much has been accomplished and much time saved by stipulation of counsel.

Mr. Taylor: If the Court please, while this witness is on the stand, I would like to introduce into evidence Plaintiffs' Identification 16, which pur-

ports to be a page of the U.S. Marshal's Office Docket, together with a certification of the United States Marshal by his Chief Deputy, John L. Buckley, that it is a true and correct copy of the official record appearing in the Office of the Marshal.

The Court: Is there any objection to what purports to be a certified copy?

Mr. Cole: Yes, Your Honor, because I don't think the United States Marshal has any right, official or statutory right, to certify to a document as being a true and correct document on file in his office. I think if that is true, it has to be done through the Clerk of the Court and the Judge of any Court, and it is simply and purely hearsay. Therefore, the defendant objects.

Mr. Taylor: Your Honor, I believe the law is that any [57] official act of a judicial or executive officer that is made in the regular course of business may be introduced in evidence over the certificate of the officer in charge of the office. I think, Your Honor, if I am not mistaken, the Circuit Court of Appeals commented upon the failure to allow that in evidence.

Mr. Cole: I object to that remark, in the first place, and in the second place they didn't say that in the Opinion.

The Court: I will let Mr. Taylor point it out to me in the Opinion. It is right here.

Mr. Cole: And I ask that that remark be stricken from the record until Mr. Taylor does point it out.

Mr. Taylor: I say I assumed that it was.

The Court: Well, I will rule on it as soon as you determine whether it is.

Mr. Taylor: If the Court please, I will not read this, but I would like to call attention to the language of the Circuit Court of Appeals regarding the return of the United States Marshal and a statement in regard to its admissibility.

The Court: Well, but don't we have two different matters we are discussing, one is the return of the official. There is no doubt about its admissibility. But the objection here is that this is inadmissible because it is at most a certified copy of a certificate, and also purports to cover certain information that the original was "offered, admitted, and marked as Plaintiff's Exhibit G, Kupoff et al., plaintiff vs. Stepovich, defendant" in a certain civil cause. [58]

It looks to me like there has been a substitution of records. The only matter before me is whether or not the Marshal may certify such a matter, and for the time being I am going to sustain the objection.

Mr. Taylor: If the Court please, may we approach the bench?

The Court: Certainly.

(Thereupon counsel approached the bench, and the following ensued out of the hearing of the jury):

Mr. Taylor: The plaintiffs feel that in view of the fact that the Circuit Court of Appeals directed this Court to allow in evidence the return of the Marshal, which was certified by him, that it also

(Testimony of Nick Kupoff.)

should allow in evidence a copy of the records of the Marshal's Office, the docket entries.

The Court: I don't think the one follows the other at all. The Court did comment and say that the return of the Marshal was good evidence, and I think it is and should have been received.

Mr. Taylor: By the same token, the Marshal makes a certificate on his return, but he is also making a certificate separate and attached to the certificate as to the docket entries in his office.

The Court: If you can convince me that the Marshal can certify to a copy in his certificate which is sufficient to enable it to be received in evidence, I will change my ruling. [59]

Is he such an official that can certify to a record? It is a simple matter. He is down the hall and can identify the original.

Mr. Taylor: But that was certified by the United States Marshal.

The Court: I see no serious problem.

(Thereupon the discussion at the bench was concluded, and counsel resumed their places at counsel table.)

Mr. Taylor: If the Court please, I would like to also have—will you mark this for identification, Mr. Clerk?

Clerk of Court: It will be Identification No. 19.

(Map by Joe Ulmer of Eastern Star Claim was marked Plaintiffs' Identification No. 19.)

Q. (By Mr. Taylor): Now, Nick, I am going to hand you Plaintiffs' Identification No. 19 and ask you to take a look at that and state whether

(Testimony of Nick Kupoff.)

or not that is a true representation of the workings in the Eastern Star Claim?

Mr. Cole: Well, your Honor, I think the first question is——

Mr. Taylor: Just a moment. Let him take a look at it before you object.

Mr. Cole: May I make an objection?

The Court: I think counsel certainly has a right to make an objection.

Mr. Cole: I think he should ask first if he knows what it [60] is, and if he does, then he could proceed from there, but it contains a lot of evidentiary dangers which I think Mr. Taylor should be required to proceed with properly at this time.

The Court: The question is very leading and broad. I don't think there is any doubt about that. The witness is now examining it and will state if he knows what it is.

Q. (By Mr. Taylor): Do you know what it is, Mr. Kupoff?

A. Well, this is a kind of a sketch of the claim and a sketch of the workings, done by engineer.

Q. By what engineer?

A. Joe Ulmer, and I remember——

Mr. Cole: I think, your Honor, we should proceed by question and answer here.

The Court: Very well.

Q. (By Mr. Taylor): Now, Mr. Kupoff, does that fairly represent the workings in the Eastern Star Claim as you knew them?

(Testimony of Nick Kupoff.)

A. That's right.

Q. And were you present at the time the survey was made of that claim, the underground survey, by Mr. Ulmer?           A. Yes.

Q. And did Mr. Ulmer testify in the previous case?

Mr. Cole: I object to that. It has no relevancy here.

The Court: Sustained. [61]

Mr. Taylor: If the Court please, I have one reason for introducing this in evidence. It shows the boundaries of the property, and I would like to state that Mr. Ulmer, who was a witness——

Mr. Cole: I object to Mr. Taylor's testifying. He is saying what it is and it hasn't been introduced in evidence. As soon as he gets it in evidence, then he can testify in connection with it, but don't testify concerning it until we get it into evidence.

Mr. Taylor: We are going to offer it in evidence, your Honor.

The Court: Has Mr. Cole been given an opportunity to examine it?

Mr. Taylor: I don't know. He has done a lot of talking about it.

The Court: He should have an opportunity to see it before you offer it.

Mr. Taylor: O.K., (handing document to Mr. Cole).

Mr. Cole: The defendant objects to its admissibility into evidence, on the ground again that it is

(Testimony of Nick Kupoff.)

hearsay, and I am prepared to state in detail the reason why it is hearsay, if the Court please.

The Court: I will be glad to examine it. I don't know the purpose for which it is offered. If it is offered for illustrative purposes——

Mr. Taylor: Your Honor, that is what it is offered for, and [62] that is because we have prepared a drawing without any legend on it at all for the purpose of showing the underground workings in the Eastern Star Mine.

The Court: Will you show it to Mr. Cole again now that he understands it is being offered for the purpose of illustration to see whether or not he has any objection to it for that reason?

Mr. Taylor: So it can be compared, your Honor, with just a plain drawing of the workings.

Mr. Cole: Well, as to the mere fact that broad workings, underground workings of the plant, I have no objection, but there are on this Identification some markings, figures, and symbols which are hearsay, and I think that they are prejudicial to the defendant's case, and I think that if Mr. Taylor wishes to show in general nature the underground workings here, he can ask this witness, who should be prepared and qualified to testify to them, but here is a map containing measurements and other symbols made or purporting to represent distances, drifts claimed, and other related matter—and other related matter, your Honor, which is pure hearsay.

The Court: Yes, there has been no foundation laid by this witness, and of course no other witness

(Testimony of Nick Kupoff.)

has testified to this identification, that would permit me to receive it, except for very limited purposes, and counsel has called my attention to the fact that there are purported measurements here that wouldn't be [63] binding on anyone and I cannot admit it.

I notice you with something there, Mr. Taylor. Is that a larger plat in a general way for the purpose of illustration?

Mr. Taylor: It is, and it is to scale, your Honor.

The Court: Well, when you talk about "scale"—well, I am going to at this time sustain the objection to Plaintiffs' Identification 19.

Mr. Taylor: If the Court please, in view of the Court's ruling, at this time I move that we excuse this witness and I will read the testimony of Mr. Joe Ulmer, the engineer who made this on the 14th day of August, 1942, and incorporate his testimony into this record. Mr. Ulmer is not in town. He is up near Circle Hot Springs.

The Court: I suppose he could have been here. What I am trying to find out, Mr. Taylor: are you trying to get that map into evidence for more than purposes of illustration now, as I understand.

Mr. Taylor: No, I would put this in for the purpose of illustration to show the jury what is up—I don't want to conceal anything from the jury.

The Court: I like to have charts and plats that will assist the jury, but certainly not if they contain some legend that is not borne out by the



(Testimony of Nick Kupoff.)

testimony. Very often maps are very helpful to the jury and the Court, but of course——

Mr. Taylor: If Mr. Cole can intelligently point out to me [64] anything that is on this map that would be prejudicial to the defendant, I would certainly stipulate to remove it. That is a drawing made by a competent engineer.

The Court: There has been no proper foundation laid for it as yet.

Mr. Cole: I don't know if I can convince Mr. Taylor, but I would like an opportunity to point out to the Court specifically my objections, if the Court wishes, but otherwise I——

The Court: Does some other theory apply to the larger plat that you have there, Mr. Taylor?

Mr. Taylor: That is made also by an engineer, but there is no legend on it at all. It is just to show the underground workings of what took place.

Mr. Cole: He hasn't offered this yet.

The Court: No, but I am wondering whether he perhaps thought that he must get the smaller one in before he could get the larger one, but it is possible that the larger one may serve your purpose. I don't know whether it will or not. But will the large one serve your purpose and the purposes of the jury?

Mr. Taylor: Yes, I believe it would, your Honor, if we could put just the distances of the length of the plant. With the addition of that I think it will serve the purpose, because that has all been testified to, as to the approximate distances.

(Testimony of Nick Kupoff.)

The Court: Maybe you can establish that by witnesses that can put the marks on the larger plat. I haven't seen it. [65]

Mr. Taylor: Perhaps Mr. Cole might stipulate as to these measurements which were made by this engineer would be placed on the various segments of this drift that was driven some distance away from the shaft which was used for hoisting the gravel.

The Court: I am not going to put him in the position of submitting a request for admission to him in the presence of the jury. Perhaps it is something that can be worked out, perhaps not, but if not, we must proceed in the usual way to rule on the evidence, and I could not receive that detailed plat at this time, which purports to give accurate measurements, because there has been no proper foundation laid.

Mr. Taylor: I have moved the Court for permission to introduce the evidence of Joe Ulmer, who has qualified as a mining engineer, who prepared this plat, and read the testimony to the jury. It is a fairly short time now, but I would like to do that tomorrow morning. It has been testified to.

The Court: Do you have something else you can go on with here for five or ten minutes with this witness? We can get back to that in the morning.

Mr. Taylor: Yes, your Honor.

I would like to have that marked for identification.

Clerk of Court: Plaintiffs' Identification 20.

(Testimony of Nick Kupoff.)

(File in Cause No. 4950 was marked Plaintiffs' Identification No. 20.)

Mr. Cole: If I may be permitted to inspect it, I may be [66] able to stipulate to its admission.

The Court: You may inspect it.

Mr. Cole: We might save a little time, your Honor, if I could read this after the close of the day, because it is quite lengthy, and perhaps I can stipulate to its admissibility.

The Court: Is that satisfactory, Mr. Taylor, or do you wish to proceed?

Mr. Taylor: I have no objection. I have some other things here I would like to introduce at this time.

The Court: Very well.

Q. (By Mr. Taylor): Now, Mr. Kupoff, I hand you Plaintiffs' Exhibit I. This hasn't been marked, or has it? That is the old identification. Pardon me.

Clerk of Court: Plaintiffs' Identification No. 21.

(Four copies of notices of attachment were marked Plaintiffs' Identification No. 21.)

Q. (By Mr. Taylor): Now, Mr. Kupoff, I hand you Plaintiffs' Identification No. 21, which consists of four parts, and ask you to state what they are.

A. These are attachments what Marshal brought out there and stick them all over buildings and—

Q. And was that brought out in conjunction with the writ of attachment that was served on you? [67]

A. Yes.

(Testimony of Nick Kupoff.)

Mr. Taylor: If the Court please, we would like to have those marked or introduced in evidence as Plaintiffs' Exhibit R.

Mr. Cole: I don't think they have been properly identified but we will stipulate to their admissibility.

The Court: They will be received.

Clerk of Court: Exhibit R, 1 to 4, inclusive.

(The four copies of notices of attachment, previously marked Plaintiffs' Identification No. 21, were received in evidence as Plaintiffs' Exhibit R-1, R-2, R-3 and R-4, respectively.)

The Court: I would like to see them after they are marked.

Clerk of Court: Yes (handing exhibit to the Court).

Mr. Taylor: If the Court please, I have just one thing. There was some testimony in regard to the three clean-ups and I would like at this time to have these marked. These could be marked as one identification, I believe.

Clerk of Court: Plaintiffs' Identification No. 22.

The Court: Three parts?

Clerk of Court: No, just two parts, your Honor, the bank book and the deposit slip, sir.

(One bank book and one deposit slip were marked Plaintiffs' Identification No. 22.)

Q. (By Mr. Taylor): Mr. Kupoff, I hand you Plaintiffs' Identification No. 22 and ask you to state, if you can, what those are.

A. Well, this first part is a deposit slip under the name [68] of North Star Mining Company. The

(Testimony of Nick Kupoff.)

second part is a bank book, which shows the amount.

Q. And what were those deposits, or what source were those funds derived from?

A. It comes from the different clean-ups, two different clean-ups we had.

Mr. Cole: No objection.

The Court: It will be received.

Clerk of Court: Exhibit S.

(The bank book and deposit slip, previously marked Plaintiffs' Identification No. 22, were received in evidence as Plaintiffs' Exhibit S.)

Mr. Taylor: If the Court please, could we take an adjournment at this time?

The Court: Yes, indeed, and I trust that there will be a number of things that can be resolved between now and ten o'clock tomorrow morning, but I think a good deal has been accomplished today. Members of the jury, please heed the admonition I have previously given to you, not to discuss the subject matter of this trial with anyone nor among yourselves, and do not form or express any opinion thereon until the case is finally submitted to you, and Court will now adjourn until ten o'clock tomorrow morning.

Clerk of Court: Court is adjourned until ten o'clock tomorrow morning.

(Thereupon, at 5:00 p.m., an adjournment was taken to 10:00 a.m., October 15, 1957.) [69]

Be It Remembered, that the trial of this cause was resumed at 10:00 a.m., October 16, 1957, before

the Honorable Vernon D. Forbes, District Judge, and a Jury.

Clerk of Court: Court is now in session.

The Court: Are the parties ready to proceed?

Mr. Cole: The defendant is ready.

Mr. Taylor: The plaintiff is ready.

The Court: The Clerk will please call the roll of the jury.

Mr. Taylor: We will stipulate all the jurors and the alternates are present.

Mr. Cole: And so will the defendant.

The Court: Very well. You may proceed.

Mr. Taylor: If the Court please, I have just now contacted Mr. Crawford. I have not had a chance to go over these maps, field drill logs, field logs of the property, and perhaps if we had about a 15-minute recess perhaps counsel and myself could stipulate in regard to some of these matters which will be going in.

The Court: Do you wish to interrupt the testimony of Mr. Kupoff?

Mr. Taylor: Yes. Mr. Crawford is quite busy getting ready to go "Outside." If possible, I would like to expedite taking his testimony.

The Court: I see. Well, does the defendant have any particular objection? [70]

Mr. Cole: I don't think there is any possible chance of the defendant stipulating to any of these exhibits that Mr. Taylor has that Mr. Crawford has with him, so I see no reason for taking a recess. I don't have any particular objections to taking the testimony of Mr. Crawford at this time, but I cer-

tainly don't like to be placed in the position of having to stipulate to irregularities at every stage of the proceedings, and I don't know when Mr. Crawford is going to go "Outside" and I don't know if he can't be here this afternoon just as easily as he can be here now.

The Court: It is your desire to interrupt the direct testimony of Mr. Kupoff and to take Mr. Crawford now?

Mr. Taylor: Yes, that was the idea but I stated I thought——

The Court: Maybe we can make up for it later. I will declare a 15-minute recess, and we will try to make up for it this afternoon by reconvening at 1:45 instead of 2:00 o'clock.

Mr. Cole: Yes, that would be satisfactory, your Honor.

The Court: Very well. Members of the jury, please heed the admonition I have previously given to you. We will take a 15-minute recess.

Clerk of Court: Court is recessed for 15 minutes.

(Thereupon a 15-minute recess was taken.)

Clerk of Court: Court is reconvened.

The Court: Do the parties wish the roll call of the jury?

Mr. Taylor: We will stipulate, your Honor, that the jurors [71] and the alternate are present.

Mr. Cole: As will the defendant.

The Court: Very well. Are you ready to proceed, Mr. Taylor?

Mr. Taylor: Yes, your Honor. If the Court please, Mr. Kupoff was on the stand. Mr. Crawford

of the United States Mining, Smelting and Refining Company is present, and I would like to take him out of turn for the purpose of having him return to his office.

The Court: Does the defendant have any valid objection to interrupting the direct examination of this plaintiff?

Mr. Cole: I don't know what a valid objection is, your Honor, in a case of this nature. Mr. Taylor has had 14 years to prepare the case. He asks for a 15-minute recess. I sat here waiting for 23 minutes, waiting for a stipulation. He hands me something and he spends all his time talking with the witness and then he wants to take him out of order. I don't think it is proper, but I have no valid objection, I think.

Mr. Taylor: It comes as a surprise. I wanted to see if he would stipulate, and he went out of the Court.

Mr. Cole: I didn't go out of here. I sat right here. That was the reason for the continuance.

The Court: Anyway, I will permit Mr. Crawford to be called out of order.

Let's proceed. [72]

### JAMES D. CRAWFORD

called as a witness in behalf of the plaintiffs, after being duly sworn, testified as follows:

#### Direct Examination

Q. (By Mr. Taylor): Will you state your name, please?      A. James D. Crawford.



(Testimony of James D. Crawford.)

Q. And where do you reside?

A. Fairbanks, Alaska.

Q. And what is your occupation, Mr. Crawford?

A. Vice President of the United States Smelting, Refining and Mining Company, and general manager of the Alaskan operation.

Q. And how long have you been connected with the United States Smelting, Refining and Mining Company?      A. Since April 15, 1929.

Q. And how long have you been connected with the Alaska operations?      A. Since that time.

Q. Now, calling your attention to—pardon me, are you a member of any professional body?

A. Yes.

Q. Of what?      A. Mining Engineers.

Q. You are a graduate engineer, are you?

A. I am.

Q. Are you acquainted with a certain claim located on Fish [73] Creek known as the Eastern Star Claim or Association?      A. Yes.

Q. And have you been on that property, Mr. Crawford?      A. Yes.

Q. And did you make or did you have made a tracing or a blue print of that claim as to drill holes and directions and boundaries?      A. Yes.

Mr. Taylor: I would like to have this marked for identification.

Clerk of Court: Plaintiffs' Identification No. 23.

(The print of a portion of prospect map was marked Plaintiffs' Identification No. 23.)

(Testimony of James D. Crawford.)

Q. (By Mr. Taylor): Now, Mr. Crawford, I will hand you Plaintiffs' Identification No. 23 and ask you to state what that particular identification is.

A. That is a print of a portion of prospect map originally prepared by Fairbanks Exploration Company in 1934 and revised to February 22, 1951, showing——

Mr. Cole: Your Honor, I don't think he should be allowed to testify as to what it is. He can only identify it and state everything it contains.

The Court: I think he is attempting to identify it.

Mr. Taylor: I think he is going into identification matters. [74]

Mr. Cole: There is great danger in stating what it contains and everything that is in it before it is admitted into evidence.

The Court: Certainly he is not going to be permitted to go into detail as to what it contains.

A. (Continuing) ——showing the company's record of their prospect drilling on the claim and its outline.

Q. (By Mr. Taylor): That is taken from the drill logs, is it, Mr. Crawford?

A. The drill hole information shown there is posted from the company's records, the company's records of drill logs they have in their possession.

Q. Does this matter reflect what the drill logs showed at each hole that was drilled?

A. Yes.

(Testimony of James D. Crawford.)

Q. And does this reflect the depth to which those drill holes went?      A. Yes.

Mr. Taylor: If the Court please, at this time I would like to offer this in evidence as Plaintiffs' Exhibit T.

Mr. Cole: The defendant objects, your Honor, on the ground that it is hearsay, and I have a lot of authority on that point if the Court wishes.

The Court: I think your objection goes to the witness' statement that this is a compilation, the figures being posted [75] from the drill logs, and the drill logs are not here in evidence.

Mr. Taylor: We have them here, your Honor. I wanted to save introducing them.

Mr. Cole: Your Honor, the drill logs are not admissible unless we have the witness here who made the drills, because the drill logs themselves are just another case of hearsay.

The Court: I would see no trouble if the drill logs were actually in evidence. I am not going into how they might get into evidence, but if they were in evidence and they were posted from the drill logs and the drill logs were in evidence, I would see no evidentiary problem.

Mr. Cole: Yes.

The Court: But it is a problem now.

Mr. Cole: Yes.

The Court: In other words, the Plaintiffs' Identification 23 attempts to state facts, such as depths, and I don't believe that a proper foundation has been laid. At this time, I must deny the offer.

(Testimony of James D. Crawford.)

Q. (By Mr. Taylor): Now, Mr. Crawford, did you at any time have a position of authority that you conducted or these drillings were conducted under your supervision?      A. No.

Q. And what officer of the company did?

A. The holes that were drilled by company employees were [76] drilled under the supervision of R. W. Mackay.

Q. And were they made at the time that you were connected with the company, Mr. Crawford?

A. Yes.

Q. And was Mr. Mackay an engineer?

A. Yes.

Q. Mining engineer?      A. Yes.

Q. And are some of these logs, are they of the drillings by Mr. Mackay? Did Mr. Mackay prepare the drill logs, or did the drillers?

A. The drillers.

Q. Are these the official records here, Mr. Crawford, or just explain to the Court for the purpose of identifying this now, if it is one of the official records of the company, and what it is compiled from.

The Court: What are you referring to now, Mr. Taylor.

Mr. Taylor: The plat. The identification 23.

Q. (By Mr. Taylor): How was that plat brought into being as it is now?

A. The platting of the claims and of the locations—

(Testimony of James D. Crawford.)

Mr. Cole: Your Honor, I object on the ground that this is irrelevant, too, how it came into being.

The Court: I think I will permit the witness to answer this. [77]

A. The platting of the claims and the locations of drill holes and other features shown on the map is based on surveys made by company engineers. The drill hole results are based on the logs. Part of the drilling was done by employees of the U. S. Smelting Company, or, rather, the Fairbanks Exploration Company, which was its predecessor at that time. Part of the drilling was done by employees of Gold Placers, Incorporated, and those results were sold to the company.

Q. And then they are made up into a complete record of each claim, then, Mr. Crawford?

A. Yes.

Mr. Taylor: Your Honor, I am going to re-offer the plat, Plaintiffs' Identification No. 23, as Exhibit T.

The Court: Will counsel please approach the bench?

(Thereupon counsel approached the bench, and the following ensued out of the hearing of the jury):

The Court: First, Mr. Taylor, I want to give you an opportunity to convince me as to the admissibility of the identification, and I would like to know the purpose for which you offer it.

Mr. Taylor: To show value.

The Court: Well, you are offering this particular

(Testimony of James D. Crawford.)

exhibit for what purpose? Showing value is a little general.

Mr. Taylor: Well, the values in that particular part of the claim in which these plaintiffs drifted to at the time that they [78] hit the face of the high-grade pay.

The Court: Let me analyze that for a moment—showing value. Now you show me on the exhibit that portion or portions that show the value.

Mr. Taylor: Here is a drill hole in that location (indicating). It was 48 feet deep. It showed \$2.14 per square foot at bedrock. They are based on the old value of gold of \$20.67, which should make it over three and a half.

The Court: What else of value is set forth on the plat—and I don't believe that it is admissible for that purpose.

Mr. Taylor: The drill logs would not be admissible, then?

The Court: The drill logs, with proper foundation, might be admissible, I don't know.

Mr. Taylor: We would have to get the drillers that did the drilling.

The Court: I am worried about the reliability of the entries on the plat, which is very, very important. Do you wish to be heard, Mr. Cole?

Mr. Cole: Yes. I would like to say that it is the defendant's contention that the proposed identification——

Mr. Taylor: It is an identification, not proposed.

Mr. Cole: The identification and proposed exhibit

(Testimony of James D. Crawford.)

is hearsay, and, further, it is double hearsay because it contains not only statements, written statements of evidence which is sought to be introduced to prove the truth of the matters asserted in the [79] written statement, but it also contains statements made by a prior driller which were used by the compiler of the map, and the defendant, not being able to cross examine the individual or individuals who made the first drilling nor to cross examine the individual who made the drillings on behalf of the Fairbanks Exploration Company, is prejudiced and therefore objects to the admissibility of this identification.

The Court: I feel obliged to sustain the objection, Mr. Taylor.

(Thereupon the discussion at the bench was concluded and counsel resumed their places at counsel table.)

Q. (By Mr. Taylor): Now, Mr. Crawford, is the United States Smelting, Refining and Mining Company the owners of the Eastern Star Association at the present time? A. No.

Q. What interest, if any, does the company have in this property? A. We have a lease on it.

Q. Could you say when that lease was secured?

A. September 26, 1942.

Q. That lease is still in effect, is it, Mr. Crawford? A. It is a 50-year lease.

Mr. Taylor: You may take the witness. [80]

(Testimony of James D. Crawford.)

Cross Examination

Q. (By Mr. Cole): How long has it been since you were on the Eastern Star Mining Claim, Mr. Crawford?      A. About 1942.

Q. Do you know whether the United States Smelting, Refining and Mining Company has mined this ground on which the Eastern Star Claim is located?

A. They have never done any mining on that ground.

Q. So so far as your company is concerned the mine claim is just in the same condition as it was when you leased it from Mr. Stepovich in 1942?

A. So far as I know.

Mr. Cole: No further questions, your Honor.

Mr. Taylor: That is all, Mr. Crawford.

The Court: Thank you, Mr. Crawford.

(Witness excused.)

Mr. Taylor: If the Court please, could we withdraw, then, the Identification 23?

The Court: Any objection, Mr. Cole?

Mr. Cole: No, your Honor.

The Court: It will be ordered withdrawn.

(Plaintiffs' Identification 23 was withdrawn.)

Mr. Taylor: Mr. Crawford, I will give you this back. [81]

Mr. Taylor: I recall Mr. Kupoff.



NICK KUPOFF

one of the plaintiffs, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Taylor): Now, Mr. Kupoff, I hand you again Plaintiffs' Identification 19 and ask you to state, if you can, when that Identification was prepared.

Mr. Cole: That is irrelevant, your Honor, until it is admitted into evidence. It has nothing to do, I don't think — no foundation to show that it is admissible.

Mr. Taylor: We will connect it up, your Honor.

The Court: He is trying to lay the foundation, and I will permit the answer.

Mr. Cole: I think he should first ask him if he knows.

The Court: I will assume that he can't answer if he doesn't know.

A. This is a map made by the engineer somewhere around August 14th, I believe it was, or somewhere around there.

Q. (By Mr. Taylor): When?

A. August 14th — 13th or 14th, somewhere around there.

Q. And who was that prepared by?

A. Joe Ulmer, his name was.

The Court: You might show the year. [82]

The Witness: 1942.

Q. (By Mr. Taylor): Now, at whose request or instance was that plat prepared, that survey made?

(Testimony of Nick Kupoff.)

Mr. Cole: It is immaterial, your Honor.

The Court: I believe it is, but I am going to permit the answer.

A. To start with——

Q. (By Mr. Taylor): No, just if you know, who had that prepared?      A. Yes, I know.

Q. Who had it prepared?

A. Stepovich sent this engineer in.

Q. Who sent the engineer?

A. Mike Stepovich.

Q. And did you have any conversation with Mike Stepovich prior to the engineer coming out there regarding the boundaries of the claim?

A. Yes.

Q. And what was that conversation?

A. Well, we had a conversation, he claimed it was out of lines of the claim.

Q. Out of line?

A. Yes, out of lines of the claim, so I say "No."

Q. Did you mean outside the boundaries of the claim? [83]      A. Yes, that's what I mean.

Q. And what did you tell him?

A. I told him it was quite a ways from the boundaries, but he didn't believe it, I guess, and then he sent the engineer out to survey.

Q. Was anything said about to quit mining because you were outside the boundaries?

Mr. Cole: I think he should say who said what.

The Court: Yes, and it is leading. Sustained.

The Witness: He said we was out of boundaries. Actually it was inside.

(Testimony of Nick Kupoff.)

Q. (By Mr. Taylor): What did you say, Nick?

A. When he claimed we was out of boundaries, and naturally if we was out of boundary, we would stop going any farther, but I say we wasn't, so that time he sent out the engineer.

Q. And then that engineer was Joe Ulmer?

A. Joe Ulmer.

Q. And I believe you testified he is a mining engineer in Alaska?      A. Yes.

Q. And where did you get this plat, Mr. Kupoff?

A. Well, I demand a copy of his work, his drawings, and so he give me that copy.

Mr. Taylor: If the Court please, I am going to offer this [84] again as a plat that was prepared by the deceased, Mike Stepovich, by an engineer in his employ, showing the underground workings of the Eastern Star Association.

Mr. Cole: And the defendant objects to its admissibility on the same grounds as urged yesterday, that it is hearsay and that the plaintiff hasn't brought it within any of the exceptions to the hearsay rule. It is very prejudicial to the defendant's case, possibly.

The Court: I am going to reserve ruling at this time and we will try to dispose of that at the next recess.

Mr. Taylor: If the Court please, at this time I would like to introduce in evidence Plaintiffs' Identification 20, which is the Court file in the case of Mike Stepovich v. James Zukoev, et al.

(Testimony of Nick Kupoff.)

Mr. Cole: The defendant will stipulate as to its admission at this time, your Honor.

The Court: Very well. It will be received.

Clerk of Court: Exhibit T.

(The court file in Cause No. 4950, previously marked Plaintiffs' Identification 20, was received in evidence as Plaintiffs' Exhibit T.)

Mr. Taylor: If the Court please, I am going to re-offer 16 at this time.

The Court: Very well, you submit it to me. Now, Mr. Cole, do you realize what 16 is?

Mr. Cole: Yes, your Honor, and the defendant objects on [85] the same grounds urged yesterday, that it is hearsay. I don't know whether the person who certified that is the United States Marshal or whether he purports to be the United States Marshal or anything about it. Anybody could have made that certification.

The Court: I think the certificate is defective, and I think it covers more than should be covered by the certificate. It is under the seal of the Marshal, "I, Stanley J. Nichols, United States Marshal for the Territory of Alaska, Fourth Division, do hereby certify that the annexed record is a full, true, and correct copy of Page 225, of Civil Docket No. 10, Marshal's Docket No. 5185, Court No. 4950."

Now, the certificate as to which page was offered, admitted and marked, and so forth, that is all superfluous, but I don't see how it could be at all

(Testimony of Nick Kupoff.)

prejudicial, and I think it is a sufficiently sufficient certificate so that I will now admit it in evidence.

Clerk of Court: Exhibit U.

(The certified Marshal's docket sheet, Case No. 4950, previously marked Plaintiffs' Identification 16, was received in evidence as Plaintiffs' Exhibit U.)

Q. (By Mr. Taylor): Now, Mr. Kupoff, you spoke yesterday in regard to what you did when you arrived at what you call the pay streak, and I am going to ask you: how far did you drive your drift into [86] the pay streak?

A. Well, I think it was 10 or 12 feet.

Q. And then you testified you opened up the face of it. What distance did you open up the face of it?

A. Well, I think I said thirty feet, but that was just for one side, thirty feet. It would be sixty feet if we figure both ways, branch out.

Q. In other words, you branched both ways when you hit there? A. That's right.

Q. And then from then on where did you mine from?

A. Well, we mined out the face, all along that face, you know.

Q. Now, Mr. Kupoff, do you know what the customary royalties were at that time for mining property?

Mr. Cole: It is immaterial, your Honor.

The Court: Sustained, Mr. Taylor.

(Testimony of Nick Kupoff.)

Mr. Taylor: I think it is very material in this case, your Honor.

The Court: The customary royalty?

Mr. Taylor: The customary royalties that the owner of a mining property gets from the——

The Court: Here you are proceeding on a lease, aren't you?

Mr. Taylor: Yes, sir. The customary royalties in the Fairbanks area that are paid to the owners of property by the [87] operators.

The Court: I am wondering what your theory is as to what is customary, when in this case you claim under a specific contract or lease.

Mr. Taylor: Thirty-three and one-third percent, yes, your Honor.

The Court: That is what you are claiming here.

Mr. Taylor: Yes, that's what it was. The lease said that.

The Court: Yes. Then, I don't see what materiality the customary lease has.

Mr. Taylor: I want to show that this is a variation from the custom, your Honor, and I would like to approach the bench to make an offer of proof.

The Court: You may make an offer of proof.

(Thereupon counsel approached the bench, and the following ensued out of the hearing of the jury):

Mr. Taylor: We expect to prove by this witness, to show that at that time 12½ percent or 15 percent was the customary royalty paid by the operators to the owners, but that this property, by reason of its

(Testimony of Nick Kupoff.)

richness and the large sums that had been taken out of the pay streak by miners under leases prior to that time, they made the lease  $33\frac{1}{3}$  percent.

The Court: All right, Mr. Cole?

Mr. Cole: Your Honor, I think the custom is entirely irrelevant. I think by custom Mr. Taylor is attempting to show the value of or the purported value of this ground, and I don't [88] think that you can do indirectly in this manner what he is attempting to do in this way. I think custom is entirely irrelevant. If he can show the value of the ground, that is one thing, but he can't be allowed to show the alleged value of it by custom. There is no relevancy whatsoever.

Mr. Taylor: I think we can show that, your Honor, by reason of the fact that they paid such an excessive rent.

Mr. Cole: I would also like to say that the mere fact that the plaintiffs made a bad agreement, if they did, certainly has nothing to do with the value of the ground. It is totally irrelevant.

Mr. Taylor: But the value of the ground had something to do with the agreement, with the terms of the lease.

The Court: I can't see the theory of the plaintiffs, and I will sustain the objection.

(Thereupon the discussion at the bench was concluded, and counsel resumed their places at counsel table.)

Q. (By Mr. Taylor): Now, Mr. Kupoff, when you opened up this face of the pay streak, did you

(Testimony of Nick Kupoff.)

test the full length of that face, which you testified was sixty feet?      A. Every few feet.

Q. And what would you say as to the values on the full length of the face, of the pay streak?

A. Well, it takes a lot of figuring, but I think I can [89] by what we get on the pan.

Mr. Cole: Excuse me, may I have that answer read, please?

The Witness: I say the whole thing takes a lot of figuring, you see, but the only way it is, we can take a pan out and pan it, and the value of gold we get, so that way we have to do lots of figuring.

Q. (By Mr. Taylor): So, then, every few feet you'd pan; is that right?      A. Sure, we did.

Q. When you were driving, removing the dirt as you went into the pay streak, did you do the same thing, follow the same procedure?

A. Yes, sir.

Q. So, then, did you have a pretty good record, then, of the values of all the dirt and gravel that you took out of the pay streak?

A. Yes, we depend on it pretty well. We depend on it.

Mr. Taylor: Could we have the recess, your Honor, now?

The Court: Yes. Members of the jury, please heed the admonition I have given to you previously, and we will take a ten-minute recess.

Clerk of Court: Court is recessed for ten minutes.

(Thereupon a ten-minute recess was taken.)



(Testimony of Nick Kupoff.)

Clerk of Court: Court is reconvened.

The Court: Unless the parties request the roll call of the [90] jury, I will assume at all times that you stipulate they are present.

Mr. Taylor: Yes, your Honor.

The Court: Very well. You may proceed.

Mr. Taylor: Will you take the stand again, Mr. Kupoff?

Q. (By Mr. Taylor): Now, Mr. Kupoff, Plaintiffs' Exhibit T is a file of the case that Mike Stepovich had against you and your partners. Now I want to ask you a few questions in regard to that. In the first cause of action it alleges that he rented to the partnership an RD-7 caterpillar with dozer at fifty dollars a day and that you owed him \$2,700.

Would you state to the Court and to the jury as to any dealings that you might have had with that particular caterpillar tractor?

A. No, sir, not——

Q. What?

A. Never used it and never had any dealing with it.

Q. And did you ever see that caterpillar tractor at the mine? A. Yes, sir; it was there.

Q. And how long was it there after you got there?

A. I think it was a couple of months parked there and Cleary Hill Mining Company sent a couple men down there and take it out. It was somewhere in March. [91]

(Testimony of Nick Kupoff.)

Q. Did you rent, though, from Mr. Stepovich a tractor?      A. I did.

Q. What kind of a tractor was that?

A. That was a small 22 cat. It was on the lease.

Q. And that one, then, do you remember the rental for that cat?      A. Yes, sir.

Q. What was it?

A. It was \$500 for the period of the lease, in two payments \$250 each. We paid already in \$250 on coming year.

Q. And that was for the entire period of the lease?      A. Yes, sir.

Q. Now, in the second cause of action in this case, Nick, he accused you and your partners of being indebted to Shermer and Reed, doing business as Pioneer Express. Did you at any time give Mr. Stepovich authority to pay those bills?

A. No, sir.

Mr. Cole: It is irrelevant, your Honor, I think.

The Court: I will permit it to stand.

Q. (By Mr. Taylor): And had you paid on those bills, Mr. Kupoff?

A. Yes, I did pay every month. At the end of the month I paid.

Q. And then also in Count No. 3 it is alleged that you were indebted to Ferguson and Rutherford in the amount of \$18.60. [92]

Did you owe Ferguson and Rutherford that much money.      A. Eighteen dollars.

Q. \$18.60?

A. Something like that, yes.

(Testimony of Nick Kupoff.)

Q. And what was the status of your account with Ferguson and Rutherford?

A. Well, I always got the bill at the end of the month.

Q. And then would you pay them?

A. I'd come in and pay them. I don't think there is any check—I don't think you will find any check there because that is the only bill I ever charged there.

Q. Now, also there was an allegation in the fourth cause of action that you owed J. E. Barrack \$11 for merchandise. Did you owe Mr. Barrack that \$11?

A. That's right, \$11.

Q. And had you received a bill for that?

A. No, I didn't receive a bill yet.

Q. And, Mr. Kupoff, how were you paying Mr. Barrack for any purchases at his store?

A. Well, at the end of the month.

Q. And also in Count No. 5 he alleged that you were indebted to the Northern Commercial Company for \$387.99. Was the partnership indebted to the Northern Commercial Company in that amount?

A. Yes, we deal at the N. C. Company.

Q. And what was your arrangement, if any, with the N. C. [93] Company in regard to payment?

A. The same as the others, at the end of the month I get a bill and statement.

Q. Now, also Mr. Stepovich alleged in regard to the N. C. bill that—I will take that back. I'll have to correct that statement. I see in the next paragraph there was a balance at the N. C. of \$187.99

(Testimony of Nick Kupoff.)

and not \$387.99. You had paid the \$200, then, on the bill, had you?      A. I think that is correct.

Q. Now also in paragraph four of that cause of action, Mr. Stepovich alleged that the Northern Commercial Company had assigned that claim to him.

Would you state whether or not an assignment was ever made from the Northern Commercial Company to Mr. Stepovich?

Mr. Cole: I object, on the grounds that he should be first asked if he knows, your Honor.

The Court: Sustained.

Mr. Taylor: Yes.

Q. (By Mr. Taylor): Do you know whether the Northern Commercial Company ever assigned their claim to Mr. Stepovich?

A. Yes, they signed to——

Q. I didn't get that.

A. N. C. Company assigned that bill to Mike.

Q. And did he pay the bill? [94]

A. I don't know.

Q. After this thing was over, did you have any dealing with the N. C. Company regarding this bill?

A. Well, they sent me a bill one time, a year later.

Q. Yes.

A. And they wanted me to pay the bill, so I went down and talked to Preston, the Manager, and he told me, he said——

(Testimony of Nick Kupoff.)

Mr. Cole: Your Honor, he is testifying to hearsay again.

The Court: Yes, sustained.

Mr. Taylor: Yes, you can't testify to that, Nick.

The Witness: And he told me, he said——

Mr. Taylor: Just a moment, Nick. The court upheld the objection.

The Witness: I better stop, then.

The Court: That's all right, Nick.

You are not permitted to tell what somebody else said.

Q. (By Mr. Taylor): So they billed you after this matter was over and tried to get you to pay the bill?

A. Yes, that's right.

Mr. Taylor: You may take the witness.

### Cross Examination

Q. (By Mr. Cole): What year did you first come to the United States, Nick? [95]

Mr. Taylor: We object as incompetent, irrelevant and immaterial to this case, your Honor.

The Court: It's preliminary. He may answer.

Mr. Taylor: It has no bearing upon this case.

The Court: That could only be told later. He may answer.

A. I came into the United States in 1915.

Q. (By Mr. Cole): Where did you go from there, after you first arrived in the United States?

A. I came to Seattle.

Q. And where did you go from there?

A. I come up here in Alaska.

(Testimony of Nick Kupoff.)

Mr. Taylor: Your Honor, I don't believe it is competent or relevant. It goes to prove none of the issues of the complaint.

The Court: It is preliminary. He may proceed.

Mr. Taylor: It is an unnecessary preliminary matter.

Q. (By Mr. Cole): What year did you get up here in Alaska?            A. 1916.

Q. Where did you first go?

A. Anchorage.

Q. How long were you there?

A. Three years.

Q. And what did you do there?

A. I went back to States. [96]

Q. You went back to the United States——

A. United States.

Q. ——after you had spent three years in Anchorage?            A. Yes, sir.

Q. Where did you go in the States?

A. Oh, I just worked out in the State of Washington.

Q. What doing?            A. Oh——

Mr. Taylor: If the Court please, I am going to object. This is only taking up the Court's time and the jury's time, and I think it is incompetent, irrelevant and immaterial and is not proving anything.

The Court: He may proceed.

Q. (By Mr. Cole): You went back to the State of Washington, and what did you do back there, then?

A. Oh, I work on different jobs, construction.

(Testimony of Nick Kupoff.)

Q. How long were you in the State of Washington?      A. Oh, up until 1932.

Q. And then where did you go from there?

A. I came up to Juneau.

Q. What did you do in Juneau?

A. Mining.

Q. What kind of mining did you do there?

A. Quartz mining.

Q. Gold mining? [97]      A. Quartz mining.

Q. Quartz mining. Do you have reference to lode mining, hard-rock mining?      A. That's it.

Q. And who did you work for there?

A. Well, they call it Alaska Juneau Mining Company.

Q. How long did you work for them?

A. Five years.

Q. Five years?      A. Yes.

Q. And that would take you up to about 1937?

A. Yes.

Q. And what happened then?

A. Oh, I came up here.

Q. Did you come to Fairbanks?

A. Yes, sir.

Q. What did you do when you got up here to Fairbanks?      A. Working in the mines.

Q. Where?

A. Out here, Sourdough Creek.

Q. Who did you work for out there?

A. Zimmerman.

Q. Zimmerman. How long did you work for him?      A. About six or seven seasons.

(Testimony of Nick Kupoff.)

Q. Six or seven seasons from 1937; is that right?

A. That's right, spring of 1937.

Q. And for six seasons you worked for Zimmerman?  
A. Yes.

Q. Well, that would take you up to 1943; is that right?  
A. 1937 to 1942.

Q. Well, let's go back and go at it this way: Who did you work for in 1938?

Mr. Taylor: He thinks he better start all over, your Honor. We object to the re-hash of this, your Honor.

The Court: Overruled.

Q. (By Mr. Cole): Who did you work for in 1938, Nick?  
A. Zimmerman.

Q. Who did you work for in 1939?

A. Zimmerman.

Q. Mr. Zimmerman?  
A. Yes.

Q. Who did you work for in 1940?

A. 1940, I worked for Bartholomew outfit out here, Bartholomew Mining Company. I worked for old man Grant, old operation.

Q. In 1940?  
A. Yes.

Q. What did you do for those fellows?

A. What I do for them?

Q. I mean what type of work did you do? [99]

A. Mining—I drive a cat for Bartholomew, and hoisting and blacksmithing for old man Grant.

Q. When you worked for Bob Bartholomew you drove a cat, and then when you worked for Mr. Grant you did a little blacksmithing?

A. That's right.



(Testimony of Nick Kupoff.)

Q. That was in 1940. Now what about 1941, what did you do then?

A. Well, I—I don't know right now that summer. I think I was out here on the wood camp for a while.

Q. What did you do out there?

A. Cutting wood.

Q. Cutting wood, and then what about 1942?

A. Well, 1942, I was here and we got this lease off Mike and we went out to Fish Creek.

Q. Now, this hard-rock mining or lode mining that you did in Juneau, that's quite a bit different type of mining, isn't it, than the placer mining which you did at Fish Creek? A. Yes.

Q. Did you ever do an awful lot of panning there when you worked for Zimmerman, or did you just mostly do cat work?

A. No, I used to clean up for him and one thing and the other.

Q. Just general labor?

A. Yes, all around. [100]

Q. Now, then when you got out to the mine, after you got the drift cleaned out and started mining operations—after you got the drift cleaned out, you immediately commenced mining operations; is that right?

A. Well, it wasn't real operations. It was driving a tunnel.

Q. Well, what did you do with the gravel that you got?

(Testimony of Nick Kupoff.)

A. We take it out and sluice it through the sluice boxes.

Q. That is mining, isn't it?

A. Well, in a way.

Q. How else do you mine, if it wasn't mining?

A. That is what we call dead work in mining. Until you really start operations, that's dead work.

Q. Weren't you operating then, or what were you doing?

A. Sure, we was driving tunnel and take out dirt and——

Q. And sluicing it?           A. Yes.

Q. And you sluiced it to recover the gold from it?           A. That's right.

Q. Now, you had a clean-up in June; is that right?

A. Yes, somewhere around there. I couldn't tell you the exact date.

Q. Well, your exhibit, which you identified, shows you had a clean-up on June 2nd, 1942; is that right?           A. That's right. [101]

Q. When did you have the next one?

A. Well, I couldn't date it.

Mr. Taylor: Instead of asking him a question, why doesn't he show him the exhibit?

The Court: He has the right to ask if he recalls.

The Witness: I couldn't remember the exact date. It should be somewhere around tenth of August.

Q. (By Mr. Cole): Did you have any around June? Did you have another clean-up in June?

(Testimony of Nick Kupoff.)

A. No, not two clean-ups in June.

Q. Just one clean-up in June? A. Yes.

Q. I hand you Plaintiffs' Exhibit S, which is a bank deposit book, and ask you to observe it, please.

A. Well, that could be in June. We would have a clean-up within ten, fifteen or twenty days, I wouldn't have time to come to town. I would be busy, so these dates could be wrong, as far as I am concerned.

Q. What do they show there?

A. Well, let's see what they show—two clean-ups in June, well, June 2 and June 16.

Q. Does it show a clean-up on June 16th?

A. Yes, June 2nd and June 16th, that is the deposit there. It doesn't mean that we have done it.

Q. It probably indicates you had another clean-up in June; is that right?

A. Well, according to the book it is two clean-ups in June, but I really can't figure out how that come out.

Q. You identified the exhibit yesterday as——

Mr. Taylor: Your Honor, I believe it is improper cross examination. The exhibit speaks for itself.

The Court: Well, counsel has a right to inquire about the exhibit of the witness.

Q. (By Mr. Cole): Didn't you say yesterday that that book, which is the Plaintiffs' Exhibit S, showed a clean-up, or indicated the deposits of clean-ups?

You can just answer yes or no.

(Testimony of Nick Kupoff.)

A. Oh, yes, I did. It shows two clean-ups, there.

Q. Well, did you have two clean-ups in June, or didn't you?

Mr. Taylor: The record speaks for itself, your Honor. I think he has answered the question.

The Court: Objection overruled. He may answer the question if he can.

The Witness: Are you waiting for me?

Mr. Cole: Pardon?

The Witness: Are you waiting for me to answer?

Q. (By Mr. Cole): Yes. Did you have two clean-ups in June, or didn't [103] you?

Mr. Taylor: Just a moment. I would like to have the question re-read.

Mr. Cole: I asked Mr. Kupoff——

Mr. Taylor: I am asking to have it re-read.

The Court: Gentlemen, I will have the question read to the witness and have the witness answer it, and we will proceed.

(Thereupon the reporter read the last question.)

A. Well, I have one clean-up. I can't remember the other.

Q. (By Mr. Cole): What did these premises look like out there when you first got out there? Were there any buildings on the ground?

A. Yes.

Q. Where were they with reference to the shaft?

A. There was some up the hill maybe five or six hundred feet and cabins. The boiler house was close to the shaft.

(Testimony of Nick Kupoff.)

Q. You had a boiler house next to the shaft?

A. That's right.

Q. And did you have any other buildings in that immediate vicinity?

A. Well, there was an old building there supposed to be tools house. I didn't even know what was there. I never opened it.

Q. Was there any wood around the boiler house? [104] A. No.

Q. No wood there. What else was on the property in this immediate vicinity?

A. Well, there was boxes, sluice boxes there, part of the pipeline was there from the ditch.

Q. And was there a gin pole there?

A. Yes.

Q. And what is a gin pole?

A. Gin pole is where you connect your cable to the shaft and carry your gravel out to the boxes, the gravel that comes out of the mine.

Q. So you have a winch going down the shaft, a cable connected to a winch, that goes down the shaft, and the winch hauls the gravel and the bucket up from the shaft and carries it along the line to the gin pole? A. That's right.

Q. And then when the bucket gets up near the gin pole there is a strip which drops the——

Mr. Taylor: Just a moment. Your Honor, I believe the witness should testify in this matter, not Mr. Cole.

The Court: This is cross examination and I see nothing wrong with it so far. He may answer.

(Testimony of Nick Kupoff.)

Q. (By Mr. Cole): —and then there is this bucket which travels up this line connected to the gin pole, the top of the gin pole, and the [105] bucket gets up near the gin pole and there is a little trip and it trips the bucket, and it dumps the ore?

A. That's right.

Q. And where were these sluice boxes located with reference to the gin pole?

A. They were located between the gin pole and the shaft.

Q. Did you dump the ore or gravel near those boxes?

A. Well, pay gravel, we dump right on top of it.

Q. Why didn't it clog the boxes?

A. We have them covered.

Q. How do you cover them up?

A. With laggings, board, whatever is necessary.

Q. So the ore travels this bucket up towards the gin pole and it is tripped and it is dumped down into a pile, the pay dirt, on top of the sluice boxes, and the sluice boxes are covered with some logs; is that right? A. Yes.

Q. How do you get the gravel into the sluice boxes?

A. Well, we put the water in the boxes and we take one board or log, whatever it happens to be, and a few gravels slide down, and when that run out you take another piece of board or log.

Q. How long are these logs?

A. It depends on whatever your box is.

Q. How long were the logs you used out there?

(Testimony of Nick Kupoff.)

A. Four feet.

Q. About four feet?

A. Four feet, six feet.

Q. And how big in diameter are they, roughly?

A. Three or four inches.

Q. And, now, when you start clearing this ore from——

Mr. Taylor: Just a moment. Your Honor, I think Mr. Cole is confused. This is not a quartz mine. This is a placer mine. The reference to "ore" is ill advised.

The Court: The witness can handle that situation, I think.

Q. (By Mr. Cole): Excuse me. When I have reference to "ore," I am referring to the pay dirt which you have taken out of the mine. Do you understand me?

A. "Ore," that's rock mine, they call it "ore." We call it pay dirt or gravel.

Q. How do you get this gravel or ore or pay dirt into the boxes when you have the logs there? You start removing the logs; is that right; and then the gravel slides down into the boxes, and you turn on the water; is that right?

A. That's right.

Q. And the water carries this gravel down into the boxes; is that right? A. That's right.

Q. And the gold, because it is heavier than the other part [107] of the ore, sinks to the bottom; is that right? A. That's right.

(Testimony of Nick Kupoff.)

Q. And that is the way you separate the gold from the rest of the ore; is that right?

A. That's right.

Q. O. K. Now, when you start to do that, where do you start on the sluice boxes? Do you start at the upper end or at the lower end, slide in from the lower end of the box?

A. Lower end.

Q. You start from the lower end of the box. I see.

Mr. Taylor: I didn't get that question.

The Court: Do you want to have it read?

Mr. Taylor: Would the Court have the reporter read that last question?

The Court: Yes, sir.

(Thereupon the reporter read the last question.)

Mr. Taylor: And what was the question prior to that?

(Thereupon the reporter read the second and third to the last questions.)

Mr. Taylor: Now, from then on, I move it be stricken because it is so indefinite, your Honor, that neither the jury nor I can understand what he means. He said, "when you do that." I don't know what he was referring to by "that." Mr. Cole possibly should make himself a little clearer.

Mr. Cole: I will be happy to do that. [108]

The Court: Very well. Proceed.

Q. (By Mr. Cole): Starting back again, after the ore or gravel is taken from the mine and



(Testimony of Nick Kupoff.)

dumped on top of the sluice boxes, which are covered with logs between three inches in diameter and four inches in diameter and between four and six feet long, and you decide to sluice the gravel, you begin removing the logs from the lower end of the——

Mr. Taylor: Just a moment. Your Honor, I am going to interrupt again and object to the witness, or pardon me for calling you a witness, Mr. Cole, stating that they cover the sluice boxes with the gravel. I would like to know whether all the sluice boxes or part of them or one end of them. It is so indefinite, your Honor, that I can't follow it. I have placer mined myself, and I can't follow it.

The Court: I see no difficulty. Counsel may proceed and if a question is put to the witness that the witness doesn't understand, we don't expect him to answer the question. I think he has shown good intelligence so far.

Mr. Cole: Yes.

Q. (By Mr. Cole): When you decide to sluice this gravel that you piled out there, you begin removing these logs from that part of the pile which lies closest to the lower end of the sluice box?

Mr. Taylor: Now, just a moment. Your Honor, I am going to [109] object, as it is a misstatement of the method of placer mining. He piled nothing toward the lower end of the sluice box, your Honor. I think he better find out where he is piling his dirt before he does that.

(Testimony of Nick Kupoff.)

The Court: Well, the objection, if it is one, is overruled and we will attempt to proceed.

Mr. Cole: If the Court please, there has been nothing improper with these questions and it's just confusing the whole thing by Mr. Taylor continually making these spurious objections. I wish the Court would admonish him.

The Court: He is entitled to make his objections, but I would like to have the objections concise and to the point, and I will rule and we will proceed in that manner.

Q. (By Mr. Cole): Now, I hate to start back again but have we got it clear that you remove these logs from the lower end of the dump when you begin to sluice? A. Yes.

Q. And then you turn on the water and the gravel is pushed down the sluice boxes and the gold sinks into the box beneath and the debris is carried on out beyond the sluice boxes and you recover the gold; is that right? A. That's right.

Q. That is the way you placer mined out there in your operation; is that right? [110]

A. Yes, sir.

Q. Is that the type of operation which you used when you had your clean-up there in June?

A. Yes.

Q. I suppose with all later clean-ups you did the same thing? A. The same thing.

Q. The same general practice. In this clean-up in June, June 2nd, as you remember it, about how many cubic yards of gravel did you put through?

(Testimony of Nick Kupoff.)

A. Well, that is pretty hard to tell. You don't measure, how are you going to figure?

Q. Can you make an estimate?

A. Well——

Q. Between, say, four and five hundred yards?

A. It is pretty hard to estimate when you take a few buckets a day and sluice it, without paying any attention.

Q. Do you have any idea how many yards you put through?

A. I would say one hundred, two hundred.

Q. One hundred to two hundred?

A. One hundred to two hundred, I can't be——

Q. What about your clean-up that you had there a little later on in June, which is reflected in that exhibit? About how many yards did you put through then?

A. That would be on the same basis as the other. I have no [111] idea of the yardage.

Q. You don't have any idea.

The Court: No idea of the yardage?

The Witness: That's right.

The Court: Thank you.

Q. (By Mr. Cole): Now, then, I suppose you were just continuing mining operations after that last clean-up which is reflected there right on through until the time the Marshal came out; is that right? A. Yes.

Q. Did you have any gravel up there in the dump when he came out? A. Oh, yes.

(Testimony of Nick Kupoff.)

Q. And how much do you suppose you had dug out there?

A. Well, I think we dug out quite a bit then. We sluiced quite a bit, and I think it was somewhere around two to three hundred yards, maybe a little less, maybe more, because we sluiced a little bit every day.

Q. Now, four or five hundred—excuse me, now, you say between three and four hundred yards, it might have been a little more and it might have been a little less?

A. That's right.

Q. You had out there on that dump when the Marshal came out; you never got to wash that up?

A. No, sir. [112]

Q. What did that pile look like—that dump?

A. It's like any other gravel pile, it's piled, dumped. You can't see no gold.

Q. Was it on the uphill side or the downhill side of the gin pole?

A. Down towards the creek.

Q. And you had these logs covering it up?

A. Logs covered the box, yes.

Q. And you had a little dump on top of those logs?

A. Yes.

Q. And you cleaned up some of that earlier and you had sluiced some of it—I'm sorry, you sluiced some of it?

A. That's right.

Q. And that dump which is out there had the pay in it; is that right?

A. Yes.

Q. That's when you were mining right in this thirty-foot or sixty-foot streak?

(Testimony of Nick Kupoff.)

A. That's right.

Q. And that was the richest pay you found out there?

A. That's right. Can I explain a little point on that dump business?

The Court: I think it would be proper.

The Witness: He said four to six feet logs. That wouldn't hold much gravel, but the dump might be fifty feet wide in the [113] bottom, build up, and your boxes go under, and the logs was just covering the boxes. It had nothing to do with the pile. The pile is big. Sometimes it's hundred feet in diameter in the bottom in the gravel dump.

Q. (By Mr. Cole): How long was that pile? I mean, do you have any idea about how long it was?

The Court: Are you talking about the pile that was there when the Marshal came?

Mr. Cole: Yes. The pile which you left when the Marshal came out.

The Witness: Oh, I would say thirty feet, but down in the base, the bottom, I would say it is forty feet.

Q. (By Mr. Cole): About forty feet long?

A. Yes, forty feet in diameter in the bottom, and we set the boxes there, and your box is off the ground, gravel naturally runs on each side and the end and in the middle somewhere pile up with rocks.

Q. About how high was it?

(Testimony of Nick Kupoff.)

A. Oh, I would say maybe fifteen, twenty feet high, maybe.

Clerk of Court: Defendant's Identification A.

(The picture of dump at mine was marked Defendant's Identification A.) [114]

Q. (By Mr. Cole): I hand you Defendant's Identification A, Mr. Kupoff, and ask you to look at it, please.

Have you observed it?

A. I see the gin pole and rock pile there.

Q. Is this picture of the scene out there as you left it, showing the sluice boxes here, except for this brush here?

Mr. Taylor: We object to that, your Honor.

The Witness: No.

Mr. Taylor: Just a moment. We are going to object to the question——

Mr. Cole: Well——

The Witness: It don't look like——

Mr. Taylor: ——on the ground that the picture is not identified.

The Court: He is asking the question and he said, "No."

The Witness: I can't say I recognize that picture. There is a gin pole there and gravel——

Q. (By Mr. Cole): Is that the gin pole which you had?      A. I don't know.

Q. Is that the sluice boxes which were there?

A. Well, I don't know. I couldn't tell you. There are thousands of gin poles and sluice boxes. I can't recognize it.

(Testimony of Nick Kupoff.)

Q. Now, in the earlier trial of this case, Mr. Kupoff, while under oath—— [115]

Mr. Taylor: What page?

Mr. Cole: Page 57 of the printed transcript.

Mr. Taylor: If the Court please, I move that we take the usual recess.

The Court: What time do you have, Mr. Hall?

Clerk of Court: It's just twelve o'clock, your Honor.

The Court: Members of the jury, please heed the admonition I have previously given to you, and this case will be continued at two o'clock.

(Thereupon, at 12:00 noon a recess was taken until 2:00 p.m.)

Afternoon Session

2:00 p.m.

Clerk of Court: Court has reconvened.

The Court: Are the parties and counsel ready to proceed?

Mr. Cole: The defendant is ready, your Honor.

Mr. Taylor: The plaintiffs are ready, your Honor.

The Court: Very well.

Mr. Taylor: We will stipulate as to the presence of the jury and the alternate juror, your Honor. They are all in the box.

The Court: Very well.

Mr. Taylor: May I be excused a moment to get my file, your Honor?

The Court: Certainly.

Mr. Cole, I believe you were engaged in cross-examination.

Mr. Cole: That is correct, your Honor.

The Court: You may proceed. [116]

### NICK KUPOFF

the witness on the stand at the time of taking the noon recess, resumed the stand for

#### Further Cross Examination

Q. (By Mr. Cole): Now, these clean-ups you had there in June, how much gravel did you put through, about, each time?

A. Well, you asked me the same question before. I don't know. I have no idea.

Q. Have you ever said that you put about three or four hundred yards through at each clean-up?

A. It might be three or four hundred yards.

Q. Do you suppose that's about how much you put through on each clean-up—three or four hundred yards?      A. It could be.

Q. If you said that on a previous occasion while under oath, it probably would be true, wouldn't it?

Mr. Taylor: Just a moment. Could I ask the counsel what page in the attorney's transcript that that appears on?

The Court: He didn't say it appeared in the transcript yet.

Mr. Taylor: I see.

Mr. Cole: Would the reporter please read the question to the witness?



(Testimony of Nick Kupoff.)

(Thereupon the reporter read the last question.)

Mr. Taylor: We object to the question, your Honor, upon the [117] ground that there is no showing that he made such a statement.

The Court: I am going to sustain the objection.

Q. (By Mr. Cole): Do you have any recollection of ever saying that under oath?

A. No. I might have, but I don't remember whether I did or not.

Q. Well, let's put it this way, then: if you have ever said that before, do you suppose it would be true?

Mr. Taylor: Just a moment. Your Honor, I am going to object to that question. Don't answer, Mr. Kupoff. I think the question is improperly framed, your Honor, and I think he must show that at such and such a time he made the statement.

The Court: Well, he is trying to lay the foundation for putting a specific question, I believe, and he may answer.

A. Well, I couldn't say yes or no.

Q. (By Mr. Cole): You just don't remember?

A. No, I don't remember whether I did or not.

Q. Don't you remember this mining operation that you are testifying about in this lawsuit?

A. I think I do.

Q. But you just don't happen to remember how much gravel you put through there?

A. That's right.

(Testimony of Nick Kupoff.)

Q. When you were getting into this so-called rich pay and [118] you were panning it, how did you pan it?

A. Well, we take dirt out of the face and shake it up and pan it, just usual panning.

Q. How do you pan gold?

A. You put it in a pan and use your water and shake it until you get your dirt out.

Q. You get the dirt out, and then what do you do?

A. Leave the gold in the pan.

Q. Then the gold remains in the pan?

A. Yes, sir.

Q. Then how do you know how much gold you have in there? Just say, "Well, that's about a dollar's worth," is that it?

A. Yes, that's—when you do so much panning, why, you use judgment.

Q. O.K. Now, this operation out there, how much did you say your total expenses were for that summer?

A. Well, it shows in the papers black and white, but I think somewhere around six, seven thousand dollars.

Mr. Cole: I have no further questions, your Honor.

Mr. Taylor: If the Court please, I have a question which I overlooked asking this morning, which I would like permission to ask. It is in the line of our direct-examination.

(Testimony of Nick Kupoff.)

Mr. Cole: I am going to object to anything that isn't proper re-direct-examination.

The Court: I have no idea what you wish to go into. Maybe you should approach the bench and tell me what you wish [119] to pursue.

(Thereupon counsel approached the bench, and the following ensued out of the hearing of the jury):

Mr. Taylor: When I got to the end of my testimony I had still left him at the mine and I had overlooked the fact as to what transpired after he left the mine, your Honor, and the condition of the place.

The Court: Well, what do you wish to go into now?

Mr. Taylor: As to when they left the mine, what happened then and why, and if they ever went back and resumed operations. I did not touch upon it. I think it is important that that be done.

The Court: I will give Mr. Cole an opportunity to make a reply on the record.

Mr. Cole: I think that Mr. Taylor was given a full opportunity to present his direct testimony before the witness was subjected to cross-examination, and I think that Mr. Taylor has stated no reasons, sufficient reasons, why he should now exceed the scope of cross-examination. I think it puts the cross-examiner at a disadvantage because the cross-examiner frames his questions with this limitation of the redirect-examination in mind, and

(Testimony of Nick Kupoff.)

then to give the direct-examiner an opportunity to go into direct-examination again is prejudicial to the defendant.

The Court: Well, I am inclined to be liberal about this, but I would like to have you tell me, Mr. Taylor, a little more [120] specifically——

Mr. Taylor: Here is the thing: everything was attached, the grub, the oil and fuel and everything. They were not able to stay there. They had to go.

The Court: What line of questioning do you wish to go into now that you overlooked on your direct-examination?

Mr. Taylor: I still left him at the place. I want to bring him back, and to see if Nick went back, what became of all their goods that were attached at the time when Mr. Stepovich attached their stuff and threw them off; if they went back and got any of that.

Mr. Cole: I am prepared to stipulate to that but I think that——

Mr. Taylor: He has the right to cross-examine when I get through.

The Court: There is no doubt about that.

Mr. Taylor: I had several matters. I had some notes that my son should be here with in a minute.

Mr. Cole: I think that the Court has been exceedingly liberal with Mr. Taylor in allowing this testimony and an opportunity to confer with his witnesses and that Mr. Taylor has other witnesses by which he can introduce this same evidence.

(Testimony of Nick Kupoff.)

The Court: Well, I don't quite understand what Mr. Taylor wants to go into. He says his son will be back soon with some notes. He is not here now. Here he comes now. I would like to know what you wish to develop. [121]

Mr. Taylor: Well, I would like to know what became of the groceries, the oil, the fuel, the shovels, the rails, and other matters in there that they had purchased, if they were ever able to retrieve them, and if they went back, and if not, why not, after the case was dismissed, the case of Stepovich versus these plaintiffs. I think it is very important.

The Court: I will permit you to re-open the direct-examination for the purpose stated.

(Thereupon the discussion at the bench was concluded, and counsel resumed their places at counsel table.)

The Court: At this time I am permitting Mr. Taylor to go into some matters that he says he overlooked on his direct-examination.

Direct Examination—(Continued)

Q. (By Mr. Taylor): Mr. Kupoff, after you were ejected from the claim by the United States Marshal—

Mr. Cole: I object to that. There is no testimony that he has ever been ejected by the Marshal.

Mr. Taylor: Your Honor, it's right in the return of the United States Marshal, which is in evidence here, that they did. They were ordered off by the United States Marshal.

(Testimony of Nick Kupoff.)

The Court: Is your objection to the word "ejected"?

Mr. Cole: Yes, your Honor. We stipulated the Marshal went out and attached certain properties, but there is certainly no [122] evidence that he ejected them.

Mr. Taylor: I will change the wording.

The Court: Very well.

Q. (By Mr. Taylor): Then, Mr. Kupoff, after you were thrown off of the property by Mr. Stepovich, did you ever go back? A. I never did.

Q. And what became of the groceries, the oil, the fuel and the shovels and other materials that you had bought for the operation of the mine?

A. As far as I know, they might be laying there yet.

Q. The record shows here, or the evidence shows that the case of Stepovich against you and your partners was dismissed on November 24, 1942. Would you state to the Court and to the jury why you did not go back at that time?

A. Well, it got cold and the mine was full of water and I thought it was going to cost me another four or five months to clean it, so my attorney advised me to ask Mike Stepovich if he will clean it.

Mr. Cole: Your Honor, I object to that and ask it be stricken, what his attorney advised him.

The Court: The motion is granted, and that portion shall be stricken and the jury will disregard what the witness said he was advised.

Mr. Taylor: Now—— [123]

(Testimony of Nick Kupoff.)

Mr. Cole: May I have that answer read?

The Court: Certainly.

(Thereupon the reporter read the last answer.)

Mr. Taylor: That part regarding what the attorney said is stricken, then, your Honor; is that it?

The Court: That's right.

Q. (By Mr. Taylor): Now, regarding that royalty of 33 $\frac{1}{3}$  per cent, Mr. Kupoff, would you state to the Court and to the jury why you agreed to pay one-third of the value of gold taken out?

Mr. Cole: And the defendant objects to that, too. It is in the lease, what they agreed, and the reasons why make no difference.

The Court: I can't see the materiality of that, why the witness should be able to testify why he entered into that agreement.

I will sustain the objection.

Q. (By Mr. Taylor): Mr. Kupoff, have you had leases of mining property before that and since that? A. Yes.

Q. And are you familiar with the royalties that have been agreed upon in Fairbanks for placer mining operations, underground mining? Just answer yes or no. A. Yes. [124]

Q. And do you know upon what they base the royalties that are paid by the operators?

Mr. Cole: I object to that again, your Honor, on the ground that it is irrelevant what people do around here in their mining.

The Court: Sustained.

(Testimony of Nick Kupoff.)

Q. (By Mr. Taylor): Mr. Kupoff, at the time that you entered into this lease, state what knowledge you had of the richness or poverty of that claim?

Mr. Cole: I think that there are great hearsay dangers in the answer which that question calls for, and I think it is improper, and I object to it on that ground.

The Court: I believe so, too, Mr. Taylor, and I also believe that this is going clear beyond what you wished to go into on redirect-examination.

Mr. Taylor: If the Court please, I also intended this morning, for the purpose of illustrating to the jury, to have a plat of the underground workings here, which I would like to have Mr. Kupoff examine and use for illustrative purposes and they are on approximately the same distances as was——

The Court: In my statement, I am not urging counsel for defendant to consent to anything, but I would like to have him examine it and see whether or not it contains anything that is objectionable to its use for illustrative purposes. I am a great [125] believer in charts that will assist the jury, but of course there must be a proper foundation laid for them if they are to be received in evidence.

Mr. Cole: Your Honor, I would be happy to stipulate to the admission of this proposed——

Mr. Taylor: I don't believe it has been marked.

Mr. Cole: ——proposed identification, if I knew



(Testimony of Nick Kupoff.)

that it represents accurately what it purports to represent, but I honestly don't know.

The Court: I will require counsel to lay the foundation.

Mr. Taylor: Yes. Mr. Kupoff, I will have you take a look.

The Court: You might have that identified.

Mr. Taylor: For identification.

Clerk of Court: Plaintiff's Identification 23. The first 23 was withdrawn.

(Large plat purporting to represent the claim and underground workings was marked Plaintiffs' Identification No. 23.)

Q. (By Mr. Taylor): Now I want you to examine Plaintiffs' Identification No. 23 and state from your knowledge if that is a fair representation of the underground workings of the Eastern Star Claim as it was at the time that this dispute arose?

A. Yes, this is true sketch or drawing, whatever you want to call it, lines of the claim out here and how far we were to the boundary and shafts being worked out and tunnels being worked out. [126]

Q. What would you say as to its being, for illustrative purposes, is that about the way it was under the ground?

A. Yes, that is pretty well lined out.

Q. This is just preliminary, your Honor. I believe you testified that from the shaft one way went a drift which was not used; is that right?

A. That's right.

(Testimony of Nick Kupoff.)

Q. And then when you got over to where there was a turn in the drift, that there was another drift over there that was not used; is that right?

A. That's right.

Q. And that is shown by broken lines; is that right? A. That's right.

Q. And I believe you testified when you got to here you made a drift that way (indicating), which was not used or mined; is that right?

A. That's right.

Q. And that is shown there with broken lines.

A. Yes.

Mr. Taylor: So, then, the broken lines would show the unused drifts and the blank lines would be the drifts that were used.

Mr. Cole: There is no objection insofar as the underground workings are concerned, but this proposed identification purports to show distances from base lines to the edge of the claim, and angles, and so forth. I don't see anything particularly damaging [127] about it. I will stipulate to its admission.

The Court: Mr. Taylor, I know Mr. Cole has stipulated to its admission, but you don't offer it, do you, for exact measurements or directions?

Mr. Taylor: No, just for the purpose of illustration, your Honor. I asked him if that is approximately the underground workings.

The Court: The object is to give the jury a general picture of the underground workings?

(Testimony of Nick Kupoff.)

Mr. Taylor: That is right, yes, sir.

The Court: But the jury is to understand that the distances and the directions are not definitely accurate.

Mr. Cole: I would also like to have the Court instruct the jury in addition to the fact that there has been no testimony that those distances and angles on there are true, it is purely speculative whether it is 100 feet or 200 feet, and also it states on there that it has been prepared from a sketch made by Joseph Ulmer, or Joe Ulmer, which the Court has excluded from evidence, and I think the Court should instruct the jury to disregard that, too.

Mr. Taylor: The reason we did it this way, your Honor, was because the Court, I believe, excluded this because there were writings on there that the Court felt were not admissible in evidence. We have excluded those writings but we have shown that the distances and the courses were taken from a survey by a [128] registered surveyor.

The Court: I want the jury to understand that Plaintiffs' Identification 23 is received for the purpose of illustration, only, and to give the jury a little better picture of the underground workings of the mine and that the distances and measurements set forth there are not accurate measurements—there has been no testimony as to them—and then I ask the jury to disregard the note at the bottom that this drawing is a copy of a sketch

(Testimony of Nick Kupoff.)

signed by Joseph Ulmer, because it is not necessarily such a copy.

Mr. Cole: Yes, your Honor, I am stipulating that it may be admitted because this witness has testified those markings and solid lines and dotted markings represent truly and accurately the general nature of the underlying drifts which they worked or which had been previously worked out.

The Court: Is that satisfactory?

Mr. Taylor: That is correct, your Honor.

The Court: That is satisfactory. It is now received in evidence for the qualified admission.

Clerk of Court: Exhibit V.

(The large plat of claim and underground workings, previously marked Plaintiffs' Identification 23, was received in evidence as Plaintiffs' Exhibit V.)

Mr. Taylor: I would like to have this marked for identification also.

Clerk of Court: Plaintiffs' Identification No. 24.

(Large plat of underground workings was marked Plaintiffs' Identification No. 24.)

Mr. Taylor: I would like to show this to Mr. Cole. That is a map. There are no distances or no directions on there, just to show an above view as to the workings there.

Mr. Cole: Yes, I will stipulate to the admission into evidence of Plaintiffs' Identification No. 24.

The Court: It will be received.

Clerk of Court: Exhibit W.

(Large plat of above view of underground

(Testimony of Nick Kupoff.)

workings previously marked Plaintiffs' Identification No. 24 was received in evidence as Plaintiffs' Exhibit W.)

Mr. Taylor: I believe that is all, your Honor.

The Court: Mr. Cole, do you desire any cross-examination?

Cross Examination

Q. (By Mr. Cole): In your drifting out there, Nick, did you do much pumping?

A. I pump water, yes.

Q. How long did you say it took you to clean out that drift there when you first went out?

Mr. Taylor: Just a moment. Just a moment. Your Honor, this is improper cross-examination. I think that counsel can only examine upon matters that were brought out on redirect-examination.

The Court: That is certainly true technically, but I haven't [130] been very technical so far in my rulings.

Mr. Cole: I think it is proper recross-examination, because the witness testified that it would take him six months to clean it out again.

The Court: You may proceed.

Q. (By Mr. Cole): How long did you say it took you to clean it out the first time?

A. I didn't say six months. I said three or four months.

Mr. Cole: That is all.

Mr. Taylor: That is all.

(Witness excused.) [131]

Mr. Taylor: Call Mr. Zukoev.

JAMES ZUKOEV

one of the plaintiffs, took the stand in his own behalf, and after being duly sworn testified as follows:

Direct Examination

Q. (By Mr. Taylor): Will you state for the record your name?

A. Jimmy—James Zukoev.

Q. Where do you reside, Mr. Zukoev?

A. 646 Fifth Avenue, Fairbanks.

Q. And how long have you resided in Fairbanks or the Fairbanks district?

A. It will be forty-four years in February.

Q. And what occupation have you followed since you have been in the Fairbanks area?

A. Mostly mining.

Q. Where did you live prior to coming to Fairbanks?      A. Where did I live?

Q. Yes.      A. I lived in 17th Street—

Q. Where?

A. When did I come first to Fairbanks?

Q. Yes, when you came to Alaska, where did you come from?

A. I come from, originally I come from San Francisco to Seattle. Then from there to Juneau, Alaska.

Q. And what did you do at Juneau? [132]

A. I couldn't do anything. I was too young and couldn't get a job under the ground.

Q. When did you first start to follow mining?

(Testimony of James Zukoev.)

A. I worked for some mines at Chatanika, I believe it was 1916 or 17—I think it was '16, not underground but work on top hauling wood for the hoist men.

Q. Where was that?

A. Chatanika, Alaska, Chatanika Creek, thirty miles from here.

Q. From here? A. Yes.

Q. And since that time have you been engaged in mining in this district? A. Yes, I did.

Q. And what kind of mining have you followed?

A. Well, I follow placer until 1939, then I started to quartz mine out at Happy Creek.

Q. What year? A. Happy Creek.

Q. What year was that? A. 1939.

Q. 1929? A. 1939.

Q. 1939. And how long did you stay out at Happy Creek? A. I stayed there one year.

Q. And you then later became one of the partners with Mr. Kupoff and Mr. Drazenovich in the lease upon Mike Stepovich's ground?

A. Yes, that's right.

Q. Had you ever been on that ground prior to the time that you and Mr. Kupoff secured the lease on it?

A. Well, I worked two different times to Mike Stepovich. I was there before it got leased.

Q. And was that on the same claim, on the Eastern Star claim?

A. Yes, that's the same claim.

Q. How long did you work there, Mr. Zukoev?

(Testimony of James Zukoev.)

A. First when I went out there to work, I worked I think either it was three months or four months.

Q. Do you remember what year that was?

A. It was 1936, if I am not mistaken.

Q. Was that altogether you worked about three months?

A. No, that's the first year I went out and worked for him.

Q. And then when did you again work for him?

A. I worked for him in 1941.

Q. And whereabouts did you work for him at that time?

A. That same claim, the same shaft we were working.

Q. Yes, now——

The Court: You might show how long he worked that time.

Q. (By Mr. Taylor): How long did you work that time, Jimmy? [134]

A. I believe I start tenth of April and worked there until fifth of October, until he closed down the mine.

Q. What was the date of the starting?

A. Tenth April, I believe.

Q. And now while you were working there in 1937, just what were your duties?

A. Well, I was wheeling dirt.

The Court: Excuse me. Was it in 1937?

The Witness: 1936.

Mr. Taylor: 1936, yes, pardon me.



(Testimony of James Zukoev.)

Q. (By Mr. Taylor): You were wheeling dirt?

A. That's right.

Q. Where would you wheel the dirt from and where to?

A. Well, we was driving the tunnel down to the old work, and then we take that dirt out from the tunnel, wheel it to the shaft, and dump it to the bucket, then the hoist men take it out.

Q. Did you use that method of mining all the time you worked there, wheeling? A. Yes.

Q. And when you were there in 1936, Mr. Zukoev, did you have anything to do with the cleaning up of the gold?

A. No, that was wintertime. We couldn't clean any gold then.

Q. Did you work there at any time during the clean-up? [135]

A. Yes, I did in 1941, all summer.

Q. And did you assist in any of the clean-ups?

A. Yes, I did.

Q. And did you do any of the panning in the drifts, Mr. Zukoev? A. Not at that time.

Q. What, if anything, did you do at the clean-ups?

A. Well, we had, whatever you call it, paddles. After we take the raffles out, we take all the gravel from the head of the box, the head of the box, and then we turn a little water and we have paddles about four feet long and four inches wide to the end, and we keep the gravel spaded out so the gravel keep on going and the gold stay behind, and

(Testimony of James Zukoev.)

Mike Stepovich was head of the box, with a little copper scoop, and whisk broom and couple pans here — a couple of whiskbrooms and pans, and he take the gold, what was left clean back, and we keep on going that way until we come to the end of the boxes.

Q. What was the nature of the gold as to size of the various pieces?

A. Well, at time that clean-up was there, I see some nuggets was just about walnut size, and some smaller.

Q. About the size of a walnut?      A. Yes.

Q. Was that true in 1941, too, Mr. Zukoev?

A. That's right. [136]

Q. At the time that you and Mr. Kupoff and Mr. Drazenovich negotiated the lease with Mr. Stepovich, were you acquainted with that ground?

A. Yes, I did.

Q. And did you have any objections to paying the royalty of thirty-three percent?

A. No, I haven't.

Q. Now, after you signed the lease, that is, you and Nick and Paul, how long afterwards did you go to the mine?

A. Well, we have to buy some rails, we went up to Ester Creek and buy rails from Nick Borovich, and we have to drop those from the tunnel out, take them out from the tunnel, then we have to drop them down to Marios. Then we have to hire the truck and bring it to town. It takes us from the 14th to 22nd of February.

(Testimony of James Zukoev.)

Q. So at that time you were assembling the things that you were going to take to the mine?

A. That's right.

Q. Then on the 22nd you say you went to the creeks?

A. Yes, we did.

Q. How did you get out there?

A. Well, we get out with Maxie Miller had one truck and also Pioneer Express, they had another truck, and we went out over the deep creek, I believe they call them there. Then we get out from there and walk down with snow shoes to the creek, to the camp. [137]

Q. Did you remain then at the camp?

A. No, we worked there all day, we were trying to get that cat started and clean the road out so that we can get our supplies in.

Q. Was there a caterpillar tractor there?

A. That's right.

Q. And was that the caterpillar tractor that was mentioned in the lease?

A. No, Mike — We don't have in the lease, but Mike make arrangements if we can get that cat started and plow the road out, which he had to coming in, you know, to camp. Also they had houses down there about two miles from the mine down the other creek, and he liked to see us plow the snow out so he could coming down toward his house. That was the agreement with us, take the bulldozer and clean the road out.

Q. And did you clean it out down to his house?

A. No, not to his house. We cleaned to the camp,

(Testimony of James Zukoev.)

then later on we cleaned to his house, but not that time we didn't clean it.

Q. What was the condition of the camp when you got there, Mr. Zukoev?

A. Well, camp was in condition the way we leave in the fall, was nothing clean except supplies was over there, and I believe each time he had lay out there they leave the supplies and Mike leased it out, somebody sell it over again. That is [138] it. Then when he closed the camp he send me out and I bring the grocery, all the groceries he had over there, brought it to his house at Cushman and Seventh.

Q. That was in '41?      A. 1941, yes.

Q. How long did you work on getting that road cleared out?      A. We worked two days.

Q. And what condition was the equipment in at the mine?

A. The mine had, about, I imagine, around 16 feet of water and we had to start the boiler so we can get steam and drop down bucket, and bucket fill up with water and coming out and dump it up on top so we can get in down the hole and get that rest of ice out.

Q. You had to bail some water out, then?

A. Yes. With a hoist, yes.

Q. What machinery did you have there, Jimmy?

A. Well, he had two old boilers, one is thirty-pound, and the other one I think is either twenty-five-pound or something. Either of them is any good hardly to keep up steam when you have them run-

(Testimony of James Zukoev.)

ning. If you have more than 15 points, then it can't keep up steam.

Q. Did you have a hoist? A. Yes, we had.

Q. What type of a hoist was it?

A. The hoist was double-drum hoist. [139]

Q. Steam operated? A. That's right.

Q. After you got the boilers going and the camp set up and the water bailed out of the shaft, what did you do?

A. We have to rig it up, take some 50-gallon drums, and have to go down to the creek and haul the water and fill up the boilers and then we fire it up. I mean we have a sump inside so we can fill it up with water, then use the hoist, which I go down there first, and I told Nick and Paul, "If I holler, hoist me back." I still was afraid that water rise.

Q. Now, after you got down to the ice, what did you do?

A. I started picking ice and hoisting it up.

Q. How long did you pick ice in the shaft, Jimmy? A. I don't suppose over a month.

Q. And then what did you find when you got down to the ground?

A. I find a lot of slough. When the water get in drift, all of it slough in, wash the gravel down, and when you are driving through, you put the laggings each side timbers—laggings. You always leave between the laggings about six or eight inches space. If any pressure come, you have to draw that dirt out, bleed it out, so it don't break the timbers in.

Q. Did you put the lagging in?

(Testimony of James Zukoev.)

A. Yes, I did, I working at that time for Mike Stepovich.

Q. What condition was that drift in that you started to [140] follow?

A. The drift was all right. The only thing was slough, a lot of slough there and frozen right down to the track. We had a little track down there, rails.

Q. The track was in there when you went down, was it, Jimmy?

A. Yes, it was about around sixty feet, something like that.

Q. And then what about the ice in the dump?

A. Well, you have to dig it up.

Q. How long did you work in that drift until you came to the face of the drift?

A. I know Mike coming down, he told me, he said, "There's a drill hole that was——"

Mr. Cole: Now, just a minute. I object.

The Court: Mr. Zukoev doesn't understand, so just listen to the question put to you by counsel and answer, rather than tell what somebody else told you.

The Witness: O.K.

Q. (By Mr. Taylor): What did you do, then, after you came to the face of the drift, Jimmy?

A. I started driving tunnel.

Q. How big a tunnel was that? What was the size of it?

A. That clears six by seven, inside the timbers.

Q. Did you timber as you drove that tunnel?

A. Yes, I did.

(Testimony of James Zukoev.)

Q. Do you remember how far you drove that tunnel, Jimmy?

A. I drive it—what Mike lifted out, I drive it from there over I think it was 79 feet.

Q. And then what did you do?

A. I coming to the old work and then drill holes.

Q. Whose old work was that?

A. That was Mike's own work, at the time he had trouble with the boys he taken——

Mr. Cole: Well, now, I object again, your Honor. It is the same thing.

The Court: Yes. The jury will disregard that remark.

Q. (By Mr. Taylor): Well, now, do you know when that had been, when those old workings had been working, or do you know who had been working in there? A. Yes.

Q. Who?

A. It was Alec Tavitoff, and Jake Hohoff, and Nick Romanoff, and Alec Carlson.

Q. When you drove in from the shaft, did you change your directions to get to that old drill hole?

A. Yes, I did.

Q. And then when you got there, what did you find? [142]

A. We didn't find nothing but old working and drill holes.

Q. Did you do any panning at that particular place? A. I did.

Q. And then what did you do?

A. Then I came back, oh, around, I don't know

(Testimony of James Zukoev.)

exactly how many feet it was, I worked toward the pay streak, started driving another tunnel there.

Q. Did you know about where that pay streak was, Jimmy?      A. Sure, I do.

Q. And then did you change your directions any more?      A. Yes, I did.

Q. In which direction were you going when you——      A. I go down east.

Q. East, and then what direction did you change? You say you changed your direction?

A. I changed my direction so I can get away from the old work, old drift.

Mr. Taylor: Maybe we could put this up and have that Identification, Exhibit 1.

Q. (By Mr. Taylor): Now, Jimmy, would you step down and with this ruler, will you stand either over on the other side or this side so you won't obscure the view of the Court or jury?

A. This is the side I seen from Mike Stepovich. Then [143] we drive the tunnel up this way and drive tunnel this way, and then he told me, "You go on up this line." (Indicating.)

Q. Wait a minute. What are you talking about now, Mr. Zukoev?

A. When we start on the shaft.

Q. In 1942?      A. 1941.

Q. 1942.      A. 1942? O.K.

This is where we was, up to here, from Mike Stepovich, right up here. We drive this tunnel up here, when we get the land, and then a cross cut this way. This was where there was drill holes, and



(Testimony of James Zukoev.)

I can find nothing but the old work except that this drill hole was about five feet from the old work, and I take the pan from there and I don't find any more than maybe four or five cents. Then I get mad and I go down to his house, and I told Mike, I say, "I don't find nothing but the drill holes, also I get into the old work," and he said, "Go on wherever you want if you want to start," so I gone back from here and start cutting from here over, and then I come into the pay streak here (indicating). That is where the pay streak is, right along here.

Mr. Cole: There is no testimony that there is any pay streak along any place, and I ask that that remark be stricken.

Mr. Taylor: Yes, there is testimony, your Honor.

Mr. Cole: I think it is quite important, your Honor, that all [144] the testimony in the record is they came up and they found some pay some place, but there is no evidence that there is any pay streak any place.

The Court: I think perhaps at this time it would be incorrect to designate it as a pay streak, until and if the testimony should bear that out. There has been testimony of what was found at a certain place, but I think the objection is well taken.

Q. (By Mr. Taylor): When you were driving that way, what was your object? What were you searching for, Jimmy?

A. I was searching for the pay streak so we can get something out of it.

Q. What do you call a pay streak?

(Testimony of James Zukoev.)

A. A pay streak, where you can get the gold.

Q. How much gold?

A. We figure, when we weigh that ground, we figure on at least from three up to four dollars a foot. That's the way it was——

Q. When you drove from here, Jimmy, this way, how far was it over to the end of that drift?

A. Well, it ought to be not over 45 feet.

Q. Now, when you got to where this drift extends here (indicating), what, if anything, did you find?

A. Well, what I find here, old work, all around here, and [145] I can't go any further on that old work, so I came back and started from here (indicating) over to here, right from here I build a car station up here, then start from there back.

Q. You drove another tunnel in here?

A. That's right.

Q. How long was that?

A. We worked there, I think we worked around three months and a half, go right through to the——coming to what we was looking for.

Q. Calling your attention to this drift here, when you went in there (indicating), what did you do with that drift?

A. I panned and I didn't find anything, so I let it go.

Q. What was the condition of that drift?

A. It was all right.

Q. And you didn't find anything in that drift?

A. Nothing worth anything.

(Testimony of James Zukoev.)

Q. Then how far did you come back this way from the junction of these drifts to where you drove the off-shoots?

A. Oh, around from, I don't know if it was 25 feet or 30 feet, something like that.

Q. So there should be another drift shown on here; is that right? A. That's right.

Q. And then when you drove that drift in, what did you do in regard to testing the ground as you drove? [146]

A. I was driving five points, and I keep cable behind me so there won't be slough coming down and somebody get hurt, and then I keep crating also, and when I come to the end ground, I mean, what we was looking for, where we can find it, then I start cross-cut, both of them.

Q. On this pay? A. That's right.

Q. After you hit that pay, how far did you drift each way along the face of it?

Mr. Cole: Your Honor, he is leading the witness into saying he found pay, and I wish the witness would testify. If he found pay, I don't mind him testifying to it, but Mr. Taylor keeps saying he found pay all the time and I object to it.

Mr. Taylor: He said he found it.

Q. (By Mr. Taylor): What did you find here, Jimmy? A. We find the pay gold.

Q. What did your panning show?

A. We panned from sometimes dollar, sometimes less than dollar, sometimes over dollar. It all depends on how you take your pan. If you take it

(Testimony of James Zukoev.)

high, that will be smaller than your pay, but if you take it right off the bedrock one foot or two feet, then your pan is richer.

Q. How did you take them? [147]

A. Well, I take it average.

Q. About how high would you say?

A. Six feet high.

Q. And down to bedrock?

A. Down to bedrock.

Q. And what would you scrape that in? How would you take it off?

A. I always set pan there and take the pick and cut it down, scratch it clear down, until I get my pan filled up.

Q. Then you would pan it?

A. That's right.

Q. And then when you strike ground like that, what do you call that ground?

A. I call that pay streak.

Q. Is that the common term among miners?

A. That's right.

Q. So then you struck the pay streak then in here (indicating) and then you drifted both ways, thirty feet on one side and thirty feet on the other side?

A. Yes, I give it ten points each side.

Q. And then did you drift into—did you start taking the dirt out of what you call the pay streak?

A. That's right.

Q. And about how deep did you go into that pay

(Testimony of James Zukoev.)

streak, or start removing the dirt from that pay streak? [148]

A. I give it three thaws there. I give it three thaws.

Q. Now just describe a thaw.

A. That's a twelve feet long point. I drive that three times, three sets. That's when we start digging out—we had two out, but the other one there.

Q. And then how far did you go into the pay streak and were removing the dirt and gravel from there? A. It would be over thirty feet.

Q. Thirty feet into the pay streak?

A. That's right.

Q. Following the pay streak?

A. That's right.

Q. But you had it opened up about—the side of it exposed about sixty feet; is that right?

A. That's right. Each point you drive will give you three feet apart. I had ten points on each side. That is sixty feet.

Q. Sixty feet. So would you have those spaced from one end of that drift along the face of the pay streak then? A. That's right.

Q. And you think you went in—I mean from the face of the pay streak, how far did you thaw in altogether? A. Well, 62 feet.

Q. What? A. Sixty-two feet altogether.

Q. Sixty-two feet? [149]

A. That's right.

Q. That you drilled — drifted along the pay streak; is that right? A. Yes.

(Testimony of James Zukoev.)

Q. So then when you got drifted along there, exposed for sixty-two feet, then how far did you come into the pay streak?

A. From this line (indicating)?

Q. Yes, from there. This way, across the pay streak.

A. Well, we go, I don't know, 78 feet or 79 feet.

Q. No, I don't think you understand, Jimmy. After, you said you got the face of your pay streak exposed?

A. Yes.

Q. You say for 62 feet. Now, when you started to take that out, how deep did you get into the pay streak, how far?

A. That would be thirty-two feet.

Q. Thirty-two feet you took out. You took thirty-two feet out, and how high?

A. Six feet.

Q. And length? A. About 60 feet.

Q. Sixty feet. 60 by 32 by 6; is that right?

A. That's right.

Mr. Taylor: If the Court please, I would like to have Mr. Zukoev show on this illustration here approximately where this would be, only for illustrative purposes. [150]

The Court: Ask him if he can draw a line indicating the drifts. Can he locate it reasonably accurately?

The Witness: We come from here (indicating) back about here, and we drive the tunnel here (indicating), and then when we get here we started

(Testimony of James Zukoev.)

that way and go here, but points all along here (indicating).

Q. (By Mr. Taylor): That's where you had your points set? A. Yes.

Q. Along the 33 feet——

A. 32 feet.

Q. ——or 60 feet.

Now, during the time that you were taking the dirt out of that face, or what you call the pay streak, did you continue to pan that?

A. Yes, I did.

Q. And generally what were the results of your panning, while you were in that particular area?

A. Well, that's what I say, if I take the pan average, sometimes dollar, sometimes less than dollar, and then if you take above the bedrock——

Q. Jimmy, we want you to state your method of panning, if you did pan regularly, and what the results of that panning were—your way of panning.

A. Average, I would say maybe \$1.80, \$1.60.

Q. Now I believe you may resume your seat, Mr. Zukoev.

Do you remember approximately what time in—what was it, that you struck this pay streak?

A. What time we struck that?

Q. Yes, about the date.

A. I believe it would be around the first, either the first part of July or the last part of June.

Q. Of June?

A. Yes, the last part, I believe.

Q. What? A. Yes, the last part of June.

(Testimony of James Zukoev.)

Q. You were working in this pay streak, then, in June, were you? A. Yes.

Q. How long did it take you, Jimmy, to drive this from here over to here (indicating)?

A. It was part of that tunnel I drive for Mick Stepovich in 1941.

Q. No, but where you came into the face of it and drove on over to this junction point here.

A. Oh, around two months, I believe.

Q. And then you drove over to another spot over here (indicating). How long did that take you?

A. I gave it three thaws there, small—two points each time. I wanted to find out the drill hole. [152]

Q. And then you came back and went over, you came, and did you come over on this drift here that was already there? A. Yes.

Q. And then you went back and came across that way (indicating); is that right?

A. That is right.

Q. Did you make any clean-ups off of that dirt out of that particular area?

A. Dirt from the pay streak?

Q. Yes. A. No, we didn't.

Q. Now, when you got this shaft and the tunnel into here cleaned out to the face, what did you do with the dirt after you started driving your drift on to where you were going?

A. Well, this hopper, when we worked for Mike Stepovich he left a hopper which all of us use to dump inside that hopper this pay dirt and every evening you go down there and sluice it out. That's



(Testimony of James Zukoev.)

where we had the hopper already which Mike left over there, you know, that low-grade gravel, but that give you a chance to haul your dirt so it don't run over your boxes or any place, and we sluice every night.

Q. Was that when you were driving over here (indicating)?      A. That's right.

Q. And was that the dirt that you got your first clean-ups out of? [153]      A. That's right.

Q. Now, would you state the amount of gold that was taken out on your first clean-up?

A. Eleven hundred something.

Q. And each one of them eleven hundred?

A. I think so. Every time we clean, I don't know, I had to go down the hole and drive the points. I left it up to Nick.

Q. Now, Mr. Zukoev, did you see Mr. Stepovich occasionally at the mine?

A. At the time we worked?

Q. Yes.

A. Sure, every day, pretty near.

Q. And what would he do there?

A. He coming down the hole and take pans and go up and pan.

Q. Did you ever have any conversation with Mr. Stepovich?

A. No, he just talked friendly, that is all.

Q. He talked what?

A. Just like two friends, that's all. Never had any argument or anything that I know of.

(Testimony of James Zukoev.)

Q. And did he ever discuss the boundaries of the claim with you?

A. No, I never did, but when Joe Ullmer coming out I know something is wrong. [154]

Mr. Cole: I move that be stricken, your Honor.

The Court: It will be stricken.

Q. (By Mr. Taylor): Now, when did Joe Ullmer come out?

A. Well, I was down drift——

Q. Just answer the question, Jimmy. When did Mr. Ullmer come out there?

A. He coming out around August, the first part, I don't know. I didn't keep track when he came out.

Q. What did he do when he came out?

A. He coming out and asked us if——

Mr. Cole: Objection, on the ground that it is hearsay.

Q. (By Mr. Taylor): What did he do, not what he said. What did he do?

A. He came down there and camp with us in the bunk house, he stay with us in bunk house, and then he was working down at the Stepovich's, but stayed over there in bunk house with us.

Q. What was he doing?

A. Well, he asked us if he can go down the drift and survey.

Q. Did he do that?

A. For a while I didn't want him to go down drift. I want to find out why he want to survey the ground.

(Testimony of James Zukoev.)

Q. Did you find out from Mr. Stepovich what he was doing?

A. He went down and talked to Mike and he came back and he say, "How about surveying top, then?" So I told him, I said, [155] "You can't survey this ground. That ground belongs to us unless you go to town and get permit from the Marshal office," and then Nick talked me out of it. He said, "Let Joe go down and survey the ground."

Q. Did he survey it underground?

A. Yes, I helped him.

Q. You helped him?

A. That's right.

Q. And did you ever get a copy of that survey?

A. Yes, we have.

Q. How long have you known Mr. Ullmer?

A. I know Joe since 1927.

Q. What is his profession, if any?

A. He is an engineer, mining engineer.

Mr. Taylor: If the Court please, it is about ten minutes after three.

The Court: Yes. I didn't want to interrupt you. Members of the jury, please heed the admonition I have previously given to you. We will take a ten-minute recess.

(Thereupon a ten-minute recess was taken.)

Clerk of Court: Court is reconvened.

The Court: You may proceed, gentlemen.

Q. (By Mr. Taylor): Now, Mr. Zukoev, I asked you prior to the recess about [156] from the time that you started, that you arrived at the camp, until

(Testimony of James Zukoev.)

you hit the pay streak, about how long it took you to do that work.

A. You mean that Mike leased it out?

Q. Sir?

A. Do you mean when Mike leased it out, before we take it over?

Q. Yes. From the time that you took it over on the 22nd day of February until you hit the pay streak, how long elapsed?

A. I imagine over five months.

Q. Do you remember about what date it was that you hit the pay streak?

A. No, I don't remember that date.

Q. Did you have an opportunity to refresh your memory on that during the recess, Mr. Zukoev?

Maybe I can put another question. Just a moment.

When I asked you how long it took, before you stated you got over here in June; that you hit the pay streak in June, was that correct?

A. No. No, that couldn't be. We was in June up at this side to the—almost to the old drift.

Q. To what?

A. To the old work over at this side by the drill hole.

Q. You were over here in June to that drill hole (indicating)? [157]

A. That's right.

Q. So then you came back and worked across over here to the pay streak—that was sometime in June?

A. I imagine it would be around, I don't know,

(Testimony of James Zukoev.)

either it was—it was around the 20th of July. I don't know for sure what date it was, but we had an awful short time to try to get into the main pay streak.

Q. Another thing, Mr. Zukoev, what were your particular duties in the partnership business there?

A. My duty was in charge under the ground.

Q. And you used the expression that you made a thaw. Will you explain to the jury what making a thaw means?

A. Well, thaw, you can drive the points——

Q. Just explain what a point is, first. Explain that.

A. It is points made out of pure steel and it is a hole inside and there is a nipple close to the head, and you connect that with a hose, a steam hose, and then you have a hammer, and you start driving that to the frozen gravel. That's a point.

Then, when you get that point in, you take it out and put the sweater in, a half-inch pipe, and you thaw with that.

Q. How long do you leave that pipe in there after you get that hole in?

A. It all depends on the kind gravel you get. If you get gravel—some of it you leave 24 hours, some leave 16 hours, some leave 12 hours, it all depends on your gravel. Over there [158] we never leave it more than 14 hours.

Q. You also stated that you opened up the face of this pay streak 62 feet and you made two or

(Testimony of James Zukoev.)

three thaws. How many thaws did you make on that?      A. I made two thaws.

Q. How many?      A. Two.

Q. Two, and how much ground—that is, when you drive these points in, how much ground can you thaw with what you would call one thaw?

A. You always thaw a little more than the length of your points.

Q. It will thaw a little farther in—that hot steam?      A. That's right.

Q. Now, you made two thaws. How much of that ground that you thawed in the face there, Jimmy, was moved to the surface of the ground?

A. Well, there was 31 feet, I figure, on each side the tunnel.

Q. Just a moment now. Just repeat that. I didn't understand it.

A. You mean how much aground we take out?

Q. Yes, off of the pay streak.

A. We take six by sixty-two by twelve.

Q. And then on your second thaw, what became of that [159] ground?

A. We take part of them out and we don't know what happened either.

Q. You took part of it out. Did you take it all?

A. No, we didn't.

Q. Why?

A. Because Marshal coming out and close us down.

Q. What did you do with the—did you have any equipment down there at that time?

(Testimony of James Zukoev.)

A. We had all the tools down there. We had eight wheelbarrows, and then we had picks and shovels, points, hammer, steam hose, sweaters, and then rails, cars. We also borrowed from Martin Sather 360 feet of pipe. They are also down there.

Q. Did you ever return to get that equipment?

A. No, we didn't.

Q. Then, when the Marshal came, did you go to the surface?

A. Yes, I was down in the drift, and I heard a pipe was rattling. A rattling pipe, that is a signal from the hoist men to the drift. Anything happens, then he raps the pipe with a hammer, then you have to come out and find out what is wrong.

I coming down to the shaft and hollered up, and he say, "There is a Marshal up here and you have to come and all the boys coming up," so we coming up and we never could get back to the hole or any other place.

Q. How long did you remain at the camp after the Marshal [160] came out?

A. Nick and I didn't get our bedding, but rest of them they give them time to roll up their bedding and get out from the camp.

Q. Jimmy, would you state whether or not you put any of that you had thawed in the pay streak through the sluice boxes?

A. Yes, we did some.

Q. About how much sluicing of that particular ground did you do?

(Testimony of James Zukoev.)

A. I imagine around five hundred yards or more.

Q. And then when you left there, how much dirt was there in the dump at the top of the shaft?

A. The hopper was full, which we was figuring washing in the evening but we never had no chance to wash it.

Q. You talk about the hopper. What is the hopper?

A. Well, the hopper is, they build a hopper on top of the sluice boxes. Then you dump a lot of dirt on top of that, and then you keep on sluicing so you can cut the trench. The more you dump, the hopper gets bigger, and sometimes you can dump three or four days, fill up hopper. That's what they call a hopper, was a trench all around sixteen or eighteen feet high on each side.

Q. How high?

A. Sixteen, eighteen feet high. That's gravel, each side. Each side of your boxes, in other words.

Q. How big a hopper did you have there on this particular claim?

A. I imagine it was about hopper from end to end, on top of boxes, would be 40 or 45 feet long.

Q. And was there any dirt in it or any ground in it when you left?      A. There sure was.

Q. And, now, what were you allowed to take with you when you moved out on the Marshal's orders?

A. Nothing at all. Just allowed, just the fellows



(Testimony of James Zukoev.)

that worked for us, they allowed them to take the bedding, that is all.

Q. Did the Marshal explain to you why he was taking over your personal property there?

A. That's right.

Q. What did he say?

A. He said Mike Stepovich brought Marshal against us because we owed him \$2,900 and he said to "Close your voice; you have to get out from the property."

Q. Did you leave that same day? A. Yes.

Q. After you left there, where did you go, Mr. Zukoev? A. We came to town, Fairbanks.

Q. And did you ever go out there again?

A. Yes, we went to Marshal's office and get permit so I [162] can go out and get our bedding.

Q. Get what?

A. Get permit from United States Marshal so we can get our beddings.

Q. How long was that after you were put out?

A. Oh, about a week.

Q. Then, did you ever go back——

A. No, I never did.

Q. ——to that country at all?

A. No. In other words——

Q. When you went back about a week later, what was the condition of the dump which you had taken out? A. The dump was still there.

Q. Did you ever visit that place later to see whether the dump was there?

A. No, I didn't.

(Testimony of James Zukoev.)

Q. Now, at the time that this suit for \$2,900 and other matters was brought, Jimmy, did you ever read the complaint in that case?

A. No, I didn't.

Q. One of which is the first count, the first cause of action, that you and your partners owed Mr. Stepovich the sum of \$2,900 for rent of a caterpillar tractor, RD-7. Did you ever rent such a caterpillar from Mr. Stepovich?

A. No, we didn't. [163]

Q. You did, though, in the lease rent a 22?

A. That's right.

Q. So, then, were you indebted, as alleged in the second cause of action, to Ferguson and Rutherford, in the sum of \$18.60?

A. Yes, we had lumber from them.

Q. And what payments, if any, had you made to Ferguson and Rutherford?

A. Well, I don't know. Nick was handling all that.

Q. And also as set forth in the fourth cause of action, did you owe Mr. Barrack, J. E. Barrack, eleven dollars?

A. Yes, we had something for the boiler, I believe it was.

Q. And in the fifth cause of action, did you have an indebtedness to Northern Commercial Company of \$187.99?

A. Yes, that's right.

Q. If you were paying the Northern Commercial, how were you paying them?

A. By the month — I think Nick paid them by

(Testimony of James Zukoev.)

the month. It got so it was over three hundred dollars something, but we had to pay two hundred dollars and the other we couldn't pay 'cause they assigned it to Mike Stepovich.

Q. Now, according to exhibits, that suit was dismissed against you on November the 24th. Did you ever go back there and try to resume mining operations after the 24th of November 1942? [164]

A. Well, we was thinking over and I heard, a fellow named Mike Jewich——

Q. I just asked you: did you go back and resume the mining operations? A. No, we didn't.

Q. And why not?

A. We filled that shaft full of water, and you couldn't work.

Q. And if you filled the shafts up, would the drifts also be filled with water? A. Yes.

Q. At that time of the year, would that water be in its liquid state, or would it be ice?

A. Sure, there would be all—the drift would be back in and all filled up with the slough.

Q. Slush? A. Yes, gravel.

Q. Did you ever hunt over in that country after this happened, Jimmy? A. No, I didn't.

Q. Before you left there, were you given authority to clean up the gold in the sluice boxes?

A. I didn't hear you.

Q. I say: before you left there, were you given any authority to clean up the gold in the sluice boxes? [165] A. No, I didn't.

(Testimony of James Zukoev.)

Mr. Taylor: May I have just a moment, your Honor?

The Court: Certainly.

Q. (By Mr. Taylor): Mr. Zukoev, I hand you Plaintiffs' Exhibit R and ask you to examine those and tell me whether you have seen them before.

Did you see those signs?      A. Yes, I did.

Q. Where?      A. Right here in this court.

Q. What?      A. Up here.

Q. Did you ever see them at the mine?

A. Yes, they had a notice up there.

Q. A notice similar to these?      A. Yes.

Q. Now, Mr. Zukoev, for the purpose of refreshing your memory, did you ever go out to the mine with Mr. Radovich—

Mr. Cole: Well, your Honor, I object. Object to as leading his witness or refreshing his memory. There isn't any evidence here that the witness' memory needs refreshing.

The Court: He said that he wasn't out there.

I am going to permit the question to be put.

Q. (By Mr. Taylor): Can you answer the question? [166]      A. I didn't hear it.

Q. Did you ever go out to the property around 1946 or 1947 with Mr. Mikulis and a Mr. Radovich?

A. I go down to Martin Sather's camp. That is as far as I go.

Q. How close was that to the—

A. Well, from there over, it would be eight miles at least.

Mr. Taylor: That is all.

Mr. Cole: No questions.

The Court: You may step down, Mr. Zukoev.

(Witness excused.)

Mr. Taylor: I call Mr. Tavitoff.

The Court: Mr. Taylor, how many more witnesses do you expect to call?

Mr. Taylor: I believe I have just one more, your Honor.

The Court: And he is not here at this moment?

Mr. Taylor: No. He has been sitting around here all the time.

The Court: The only reason I am inquiring, we got off our schedule a little. Perhaps this would be a good time to take a ten-minute recess. You will have him here?

Mr. Taylor: Yes.

The Court: Very well. Members of the jury, please heed the admonition I have previously given to you, and we will take a ten-minute recess. [167]

Clerk of Court: Court is recessed for ten minutes.

(Thereupon a ten-minute recess was taken.)

Clerk of Court: Court is reconvened.

The Court: It looks like the defendant is ready to proceed.

Mr. Cole: Yes, your Honor.

The Court: Has your witness shown up, Mr. Taylor?

Mr. Taylor: No, your Honor, he did not, but one of the defendants is out trying to find him. He

walked out just a few moments before the recess and Mr. Zukoev is looking for him. He may be here in a few moments.

The Court: Well, we cannot possibly judge the reason for his disappearance yet.

Mr. Taylor: No, we surely can't. He has been sitting here all day yesterday and today.

The Court: What do you suggest?

Mr. Taylor: I move for additional time.

The Court: Ten minutes?

Mr. Taylor: That would help, your Honor. I don't think his testimony will take over 20 or 25 minutes.

The Court: Very well. We will take a ten-minute recess.

Clerk of Court: Court is at recess for ten minutes.

(Thereupon a ten-minute recess was taken, awaiting the arrival of the next witness.) [168]

Clerk of Court: Court is reconvened.

The Court: Are the parties ready to proceed?

Mr. Taylor: Yes, Your Honor. I would like to call Mr. Tavittoff,

### ALEC TAVITOFF

called as a witness on behalf of plaintiffs, after being duly sworn, testified as follows:

#### Direct Examination

Q. (By Mr. Taylor): Will state your name, please?      A. Alec Tavittoff.

Q. And where do you reside, Mr. Tavittoff?

(Testimony of Alec Tavitoff.)

A. I live in Fairbanks.

Q. What is your occupation? A. Miner.

Q. And how long have you lived in Alaska?

A. Since 1911.

Q. And how long have you been engaged in mining? A. Since then.

A. And has that been in the Fairbanks area?

A. Most of it, yes.

Q. What type of mining did you follow, Alec?

A. Placer mining, underground.

Q. Drift mining?

A. Drift mining, yes. [169]

Q. Are you acquainted with a claim on Fish Creek, known as Eastern Star Claim?

A. Yes.

Q. And have you ever worked on the Eastern Star Claim? A. Yes.

Q. When did you work there?

A. It was the fall of 1935.

Q. Who were you working for?

A. For myself.

Q. Who owned the property, the claim, at that time? A. Mike Stepovich's claim.

Q. And did you have agreement in regard to working the mine?

A. Well, we got a lease——

Mr. Cole: That is irrelevant, Your Honor. It has nothing to do with this case whatsoever.

The Court: It may stand so far.

Q. (By Mr. Taylor): Then, under that lease, what did you do, Alec?

(Testimony of Alec Tavitoff.)

Mr. Cole: That is a very broad question, and I object to it.

Q. (By Mr. Taylor): What did you first do after you got the lease?

Mr. Cole: No, Your Honor, it has nothing to do with this case. I mean, I don't want to be objectionable but——

The Court: I am troubled as to the relevancy, Mr. Taylor. [170]

Mr. Taylor: Its relevancy is to show value, Your Honor.

The Court: But you are talking about a lease.

Mr. Taylor: Yes, I am not worrying about the lease. I mean the work he did on the ground. I wanted to see what authority he had for working there.

The Court: Yes, but you have him out there now in the fall of 1935.

Mr. Taylor: Yes, sir.

The Court: You may proceed by question, objection, and ruling.

Q. (By Mr. Taylor): What did you first do in regard to mining operations?

A. Well, we cleaned the shaft out. It was an old shaft there.

Mr. Cole: I think he should say what shaft. We don't know whether the shaft is a thousand yards away.

Q. (By Mr. Taylor): How deep was this shaft?

Mr. Cole: I object to it, Your Honor.



(Testimony of Alec Tavittoff.)

The Court: Yes. We should establish what shaft we are talking about, Mr. Taylor.

The Witness: That was a shaft—I don't know the name of the people that send the shaft before we did, went out there.

Mr. Cole: Well, I——

Mr. Taylor: Let the man answer here. [171]

Mr. Cole: Well, if he answers the question.

A. The shaft, eight by eight working shaft, square, they dig it down to 75, between 75 and 80 feet before they get to bedrock. When they get to bedrock, soon they hit bedrock——

Mr. Cole: Your Honor, I hate to object all the time——

The Court: I will stop the witness at this point.

The Witness: As soon as he hit the bedrock——

Mr. Taylor: Just a moment now.

Q. (By Mr. Taylor): What part of the claim was that shaft located in?

A. The house from where Mike, Mike Stepovich himself was living by the river there, about 700 yards or a thousand yards from there, and it was kind of a little hillside to the creek, a bank, kind of, and it was about five, six hundred yards from the creek.

Q. About what?

A. From the creek, from the——

Q. Did you——

A. Up on the hillside.

Q. Do you know where the boundaries of the Eastern Star Claim were?

(Testimony of Alec Tavitoff.)

A. Yes, that's it. That's what it was.

Q. And near what boundary line was the claim?

A. Boundary line, I don't know where was the boundary line because he won't—[172]

Q. Well, say, the east line or the west line, did you know where they were?

A. West line, our line, was hundred feet, you mean? Are you asking me?

Q. No. I am asking you, did you know where the west or the east line were? A. No.

Q. And did you know where the north line was?

A. No.

Q. Or the south line?

A. No, I don't know the line.

Q. How did you know that you were on the Stepovich property, then, on the Eastern Star Claim?

A. Well, he take me out and give me the ground to work.

Q. Mr. Stepovich did that? A. Yes.

Q. And, now, could you examine this plat, this map, over here?

A. I don't know. That map kind of look to me upside down from here to the Fish Creek. I am a very poor map reader.

Mr. Cole: Well, Your Honor, I would object to any examination of that map until this witness establishes that he knows something about that map. Right now he doesn't even know what map or what it is.

(Testimony of Alec Tavittoff.)

The Court: I think Mr. Taylor is trying to establish that. Do you want to take the map off the board, or do you want the [173] witness to step down?

Mr. Taylor: I would like to have him step down and examine this and see if he can point out—

The Witness: Well, I know the creek, if I get the creek here, I can tell you by the creek. The creek from here, it is standing just about west, southwest of it, see, and we were out from the creek—

The Court: Is the creek shown?

Mr. Cole: The creek isn't even shown on this map, your Honor. He doesn't know whether it's the Eastern Star Claim.

The Witness: Well, Eastern Star was about, I would say, a thousand yards from the house up to the westerly.

Q. (By Mr. Taylor): But you don't know where that shaft was?

A. That shaft was in Eastern Star Claim.

Q. Do you know what part of the claim?

A. It's about right in the middle of—a little up to the west, more up to the west from center—easterly more.

Mr. Taylor: If the Court please, I believe that the fact that that shaft was driven there, I think we should be allowed to show the amount of pay or the indications of pay on any part of the claim for what it's worth.

(Testimony of Alec Tavitoff.)

The Court: The difficulty is the witness so far has merely testified that he was on the Eastern Star Claim.

Mr. Taylor: That's right. [174]

The Court: But the location is not shown by the witness. I don't know how many shafts there might have been there. There is no testimony as to that.

Q. (By Mr. Taylor): Had anybody else mined on that ground at that time, Alec?

A. That was the first shaft in that Fish Creek for placer mining. The first, number one, shaft.

Q. So there was only the one shaft there at the time that you were there?

A. That was the first shaft that was on that creek for mining.

Q. And then after you got that shaft cleaned out, what did you do?

Mr. Cole: That is totally irrelevant, what he did after he cleaned the shaft, Your Honor. We don't know which shaft he is talking about.

Mr. Taylor: I think any part of the claim, Your Honor. I think any part of the Eastern Star because it is——

The Court: I would be afraid of that, Mr. Taylor, to be able to show value of any part of the claim.

Mr. Taylor: It shows that the claim was gold bearing.

The Court: Well, but to show the gold-bearing

(Testimony of Alec Tavitoff.)

properties in a territory that is not germane to this lawsuit would not be helpful to the jury. [175]

Mr. Taylor: The claim was 1,320 feet by 600 feet, Your Honor, so it would be in a fairly confined area.

The Court: What testimony did we have as to the size of the claim?

Mr. Taylor: That is judicial. The Court could take judicial notice of the size of the claim. That is the biggest claim you can get. We haven't tried to prove that, Your Honor, because that is established by law.

The Court: Well, I would be afraid to let the testimony in without having the location of this gentleman's work spelled out. You have testimony now as to the shaft in 1935, which was seven years prior to the time involved. It seems to me it would be a little dangerous.

Mr. Taylor: I can't see the danger part of it, Your Honor, the fact that it shows that a large part of this claim was gold bearing. Many people have worked it since then, but this happened to be the first man on that part of the creek that worked on the gold mine, but I am not going to argue with the Court. I will excuse the witness. I think, though, that the jury should be allowed to take into consideration for what it is worth, with the warning that although it is not shown on there, it indicates that the claim was a gold-bearing claim.

The Court: I would think counsel would be able

to get the testimony of this witness in very properly, by locating the place where he did mine in 1935. [176]

Mr. Taylor: Would the Court now adjourn until tomorrow morning?

The Court: I think it is important enough so that I wouldn't want to preclude you from attempting to locate where this man worked.

Mr. Taylor: If the Court please, could we take an adjournment until tomorrow morning?

Mr. Cole: Your Honor, may I be heard on that?

The Court: Yes.

Mr. Cole: I would like to say that the witness is on the stand and he has an opportunity to testify as to where he was and where he drilled the hole, and these claims are big claims. We don't know the size of this claim, but plaintiffs' own proof shows that there wasn't gold-bearing ore in a large part of where they were already. Now, some place on this claim, we don't know where, this man wants to testify he drilled the shaft, and I don't know what the results of that shaft will show, but I would like to say this: if he remembers and he knows, he can testify to it right while he is on the stand now without taking an adjournment until tomorrow morning. I think if he knows he can testify to it now. I would object to any continuance until tomorrow on that issue.

The Court: Well, I realize, too, that the attorneys have had a long time to prepare this lawsuit.

Mr. Taylor: I never knew, Your Honor, that this man was [177] a witness until yesterday. That's why I've had him here.

Mr. Cole: He has already said he doesn't know. I don't know what else there is to say.

Mr. Taylor: Your Honor, I believe if I could get a map of the Eastern Star Claim that Mr. Tavittoff can pinpoint on that practically the location of the shaft.

The Court: Of course, this was the plat that was put into evidence by the plaintiffs.

Mr. Taylor: No, it does not show only one boundary, Your Honor. It does not show the north and south boundaries. The only boundary that shows on this is the eastern boundary. It doesn't show the south or the north boundary.

The Court: Well, for the sake of twenty-five minutes' Court time, why, I am not going to cut the plaintiffs short, but I will hold the plaintiffs to strict proof in the morning at ten o'clock, and I will now grant the motion for an adjournment until ten o'clock tomorrow morning made on behalf of the plaintiffs and resisted by the defendant. I admonish the jury not to discuss the subject matter of this trial with anyone nor among yourselves and do not form or express any opinion of the subject matter of the trial until the case is finally submitted to you. Will you please return to your places at ten o'clock tomorrow morning?

(Thereupon, at 4:40 p.m., October 15, 1957,

an adjournment was taken to 10:00 a.m., October 16, 1957.) [178]

Be It Remembered, that at 10:00 a.m. October 16, 1957, the trial of this cause was resumed, The Honorable Vernon D. Forbes, District Judge, presiding:

(The jury was not present in the courtroom.)

Clerk of Court: Court is now in session.

The Court: I have had the jury kept out to see if there is anything we can accomplish before calling the jury in.

Mr. Taylor: I was going to bring up the question of the admissibility of Plaintiffs' Identification 19, which has been offered, and I think with the testimony of Mr. Zukoev that we have laid the proper foundation for the admission of that.

The Court: Am I to construe your remarks as re-offering the Identification at this time?

Mr. Taylor: I am re-offering it, your Honor, yes, sir.

The Court: According to my notes, Identification 19 is the sketch of claim.

Mr. Taylor: That is the drawing by Joe Ullmer, mining engineer. I would like to say in that respect, Your Honor, that Mr. Zukoev testified as to the dispute as to the boundaries and that as a result the defendant in this case employed Joe Ullmer to make a survey of the underground workings to ascertain whether or not the workings had extended through the exterior boundaries of the claim, and I



think, Your Honor, that matter would be evidence that the plaintiffs in this case were correct and that the evidence against—it would be a declaration [179] but against the defendant, that was made at his request and at his expense.

The Court: As I see it, Mr. Taylor, the only thing that is added since I refused the identification into evidence is the testimony of James Zukoev, as you have outlined, to the effect that he said that Joe Ullmer was hired or retained by the defendant, Mike Stepovich, to make a survey. Is that binding on the defendant here? And he said that he did receive a copy of it, and that is the only additional ground, if any ground that be, to admit the identification into evidence.

In view of the re-offer, Mr. Cole, do you have any objection?

Mr. Cole: I have the same objection that I made, that it is just purely hearsay and inadmissible for that reason.

The Court: Yes. I will sustain the objection.

What I have in mind, Mr. Taylor, when we adjourned last night you had a witness on the stand and wanted a little opportunity to look into his testimony a little deeper before proceeding this morning, and I think it proper for me to ask you in the absence of the jury what you propose to prove by the witness.

Mr. Taylor: Your Honor, we propose to prove by the witness that he did sink the first shaft, what

was known as Discovery Shaft on the Eastern Star Claim and that it was within close proximity to the workings of the plaintiffs' on the property and that, in fact, one of the old workings that [180] Mr. Zukoev testified to that he broke into was the workings of Mr. Tavitoff and in one of the drifts that Mr. Tavitoff ran for 100 feet that he took out approximately \$6,000 in gold dust. He had a very limited area to work. He was shown where to put the shaft down, and then he could drive a shaft any direction he wished for 100 feet, and that was the limitation, and one of the drifts that he drove for 100 feet he extracted some \$6,000 from it.

The Court: What I am wondering about is whether I can treat your statement as an offer of proof and make a ruling at this time or whether you wish to have the jury brought in and put the witness on the stand and attempt to elicit his testimony, subject to objection.

Mr. Taylor: Either way that the Court desires. I have talked with him this morning. His memory has been refreshed, because it was 22 years ago that he sunk the Discovery Shaft on the property and we have other testimony that that shaft is still there and that it is still known as the Discovery Shaft.

The Court: Which way do you prefer, to call the jury in and go ahead, or do you wish to make a formal offer of proof at this time?

Mr. Taylor: Well, if the Court please, I would make a formal offer of proof at this time.

The Court: Very well. Mr. Cole, you heard the offer of proof of the plaintiff.

Mr. Cole: I can't see where it has any bearing on this [181] case whatsoever. I object on the ground that it is irrelevant and dangerously prejudicial. Therefore, I object to the admission of any testimony under Mr. Taylor's offer of proof.

The Court: Mr. Taylor, I realize the importance of this offer to your clients and to this case, but I can't see the materiality of the evidence, and I think it would be prejudicial and not at all helpful to the jury to assist the jury in determining the plaintiffs' damages. I don't believe what this witness recovered in a different location years prior would have any bearing whatsoever on the plaintiffs' damage, any more than I think it would be proper for the defendants to bring in witnesses that mined ground in other places and produced nothing. As a matter of fact, the evidence already shows that these plaintiffs drove drifts and recovered nothing and were in worthless ground and changed their course, and I can't see the materiality of that type of testimony.

Mr. Taylor: I believe that the testimony, Your Honor, uncontradicted testimony, is here that the plaintiffs all the time they were driving the tunnels did get gold. They had three cleanups before they ever hit the pay streak, in which they took out around thirty-five hundred dollars in gold, but what we intend to prove, Your Honor, was that the shaft that Mr. Tavitoft sunk and he hit the pay streak,

and which other miners had also hit and taken off large sums of money. Unfortunately one man is dead, and took out 3,300 ounces in the season on that same pay [182] streak. It only goes to show, Your Honor, that that pay streak runs for a considerable ways there and there would be, if the plaintiffs had been allowed to continue under their contract, they could work all of the next season on the pay streak over to the left limits of the claim. That is the only reason that we put that in, to show that in that particular area there was pay.

Mr. Cole: Your Honor, I would like to say that Mr. Taylor is saying that this witness will testify that the plaintiffs hit his shaft which, first, he can't testify to. It has no relevancy.

Mr. Taylor: No.

Mr. Cole: That is exactly what he said in his offer of proof.

And, secondly, he said the offer of proof would show that the plaintiffs drove to the old shaft worked by Mr. Tavitoff, and the plaintiffs testified they found nothing there, so I don't see what relevancy that has whatsoever. That is the uncontradicted plaintiffs' own testimony.

Mr. Taylor: Your Honor, Mr. Cole is entirely in error in that. I did not say they went to the shaft of Mr. Tavitoff. I said Mr. Tavitoff drove several drifts away from his shaft 100 feet in several directions and they did break into one of the old drifts of his which didn't necessarily have pay, be-

cause he drove three drifts before they found in the fourth drift he did get on the pay streak, because he had to confine himself to one [183] shaft and drive 100 feet in any direction he wanted.

Mr. Cole: There is no testimony that they hit one of his shafts.

The Court: Mr. Taylor, I ask you this, if it is proper: where do you claim that this man, Alec Tavittoff, struck what you call the pay streak?

Mr. Taylor: About in here (indicating) is where his shaft was and that he drove all directions, and once when he came this way he hit the pay streak.

The Court: Is that anywhere near the proximity of the pay streak allegedly struck by the plaintiff?

Mr. Taylor: Here is the pay streak struck by the plaintiff. His shaft was there (indicating), and he struck the pay streak here (indicating), took \$6,000 out of a 100-foot drift.

The Court: What distance is that from the alleged pay streak struck by the plaintiffs?

Mr. Taylor: He evidently struck it 100 feet and he struck pay. I am not going to belabor the issues, Your Honor. It is up to the Court to decide.

The Court: I would only let the testimony in if the witness is able to testify as to the nature of the ground in the alleged pay streak struck by the plaintiffs in this action, but I am not going to permit him to testify to the richness nor the poverty of the ground elsewhere.

Mr. Cole: And I might point out, Your Honor,

that there is [184] no evidence that the pay streak runs any way, this way, or that, and the plaintiffs have never testified that they saw any sort of a shaft down there. It certainly doesn't show on the map, and now the cross-examiner can't cross-examine the plaintiffs in connection with what they found. They also testified in that area they found nothing. Here I am at a tremendous disadvantage. There is nothing I can do.

Mr. Taylor: Your Honor, I don't take issue with the defense counsel for trying to influence the jury, but I don't think he should try to mislead the Court, because there is testimony, Your Honor, that when the plaintiffs drove across here, and Mr. Zukoev showed on here where his points were, that he put two points there, he struck this pay streak; they opened up this pay streak 60 feet and it was good pay all the length of that face, and he did take his money out of there.

The Court: I don't think that is inconsistent with the remarks of counsel.

Mr. Taylor: He said there was no testimony to that effect.

The Court: Well, I think you misunderstood.

The only question is whether or not you wish to rely on your offer of proof and the ruling of the Court or whether you wish to put the witness on the stand for questions, objections and rulings.

Mr. Taylor: I will submit it to the Court, Your Honor.

The Court: Very well, I will deny the offer of proof. [185]

Is there anything else to be taken up in the absence of the jury?

(No response.)

The Court: If there is nothing else to be taken up in the absence of the jury, Mr. Jacobs, will you please ask the jury to come in.

(Thereupon the jury was brought into the courtroom and resumed their seats in the jury box.)

The Court: Will the Clerk please call the roll of the jury?

(Thereupon the Clerk of Court called the roll of the jury.)

Clerk of Court: They are all present, Your Honor, and the alternate also.

The Court: Very well. You may proceed, Mr. Taylor.

Mr. Taylor: The plaintiffs rest, Your Honor.

Mr. Cole: At the risk of inconveniencing the jury, I think that the proceedings are perhaps proper at this time out of the presence of the jury.

The Court: Members of the jury, I realize we are shoving you around quite a little. That is part of the trial of a lawsuit and no one is to blame for this. There are some matters to be taken up out of your hearing, and I will excuse you for at least fifteen minutes and I will send for you.

(Thereupon the jury left the courtroom.)

Mr. Cole: At this time, Your Honor, the defendant moves to dismiss from plaintiffs' complaint all claim for loss of future [186] profits. The motion is based upon the fact that plaintiffs, in their case, have failed to prove any damages other than nominal damages which they might recover for breach of the covenant of quiet enjoyment for which they are seeking recovery. If they are entitled to any damages whatsoever, they are entitled only to nominal damages.

The plaintiffs' complaint, I think, lends itself into two claims: one for \$100,000 for damages, and one for a sum between six and seven thousand dollars for damages for loss of expenses or for expenses claimed as preparatory work done on the claim.

I think that insofar as the claim for preparatory expenses is concerned, that that claim is not as a matter of law recoverable. The recovery for damages for breach of any covenant of quiet enjoyment follows the general rule of law for breach of a contract, those damages naturally and proximately flowing from the defendant's act, and in cases of breaches of covenants of leases, the same rule of law applies.

This limits plaintiffs recovery to loss of future profits and any expenses which he may have incurred in preparing that ground for operation are not recoverable, and I cite as authority for that proposition the case of *Butterfield v. Snively*, 19 *Northeastern Reporter*, 2d Series, page 284, a de-



cision from Ohio in 1937, in which damages were claimed for breach of a mining lease, and the Court expressly held reversing a rather long and confused instruction that the expenses incurred [187] in developing a mining lease are not collectible by the lessee as damages for wrongful eviction.

I also cite the case of *New v. Kinser*, *Southwestern Reporter*, 2nd Series, 1054. It, too, was an action for damages for breach of a lease by the lessor for loss of prospective profits. The lessee claimed damages for loss of prospective profits. The trial Court there had instructed the jury that the measure of damages was the amount that the lessee's operations and expenditures had increased the value of plaintiffs' property.

Now, that is not exactly the same theory of the plaintiff in this action, but it is very close, and it is the nearest phrase in terms of the amount of dollars that the plaintiffs' lessees had expended on the property, and here is what the Court said, reversing the trial court:

"It seems to us that if the plaintiff breached the contract and prevented the defendant performing it, the measure of his recovery is the net profit he could reasonably had made and not the enhancement of the lessor's property. The defendant had prayed for the recovery of lost profits, and the first opinion indicated that was the proper measure of damages. But the evidence was not directed to that end. On his counterclaim the defendant should have shown

the quantity of coal he could have produced if he had not been interfered with, the probable cost and expense, and his net profits." [188]

That is what the Kentucky Court says is the measure of damages for the breach of a covenant of a lease, and they cite considerable authority for that proposition in that opinion, following a long line of Kentucky decisions, but that case, *New v. Kinser* is the clearest-cut proposition or statement of the law that I could find for that proposition, and *Butterfield v. Snively* is a clear-cut holding that the plaintiffs are not entitled to the expenses which they have incurred in preparing this ground for mining operation.

On the contrary, the rule of law, as pointed out by the authorities, and there are many of them, states that they are entitled to their lost profits. So we have to turn plaintiffs' evidence to determine whether they had any lost profits. And what does the evidence show?

Well, it shows, first of all, by plaintiffs' testimony and the testimony of Mr. Kupoff, that they incurred expenses of between six and seven thousand dollars. Their exhibits, their checks, check stubs show expenses of at least four thousand dollars, and added on to that is the testimony of Mr. Kupoff. So without any question they have expended between six and seven thousand dollars in operating that mine between February and August of 1942.

How much money did they take out of the ground? What was their recovery or income? Well, Mr. Kupoff really doesn't recall. He is not sure, but he was able to identify this deposit book [189] in the Bank of Fairbanks, which is Plaintiffs' Exhibit S, and it shows a deposit on June 2, 1942, with the bank of \$1,130. It shows another one on June 16, 1942, of \$1,100. And although Mr. Kupoff doesn't remember it, it shows another one on August 8, 1942, of \$1,296. Adding those deposits, their total recovery of gold from the mine did not exceed \$3,500, give or take a few dollars, but clearly not even \$4,000. So what did their operations show by their own testimony during the summer of 1942 but a loss of between three and four thousand dollars—at least \$3,000. That testimony is unrefuted, that they didn't make any money there in 1942.

Now they are going to come in argue, "Well, we had a lot of rich pay in the dump." But who knows how much rich pay they had in the dump? We don't know whether they ten dollars' rich pay in the dump, or \$10,000 rich pay in the dump. It doesn't show. There is not one shred of evidence other than they had some rich pans they put into that dump. Mr. Kupoff can't remember how much gravel was in that dump. There were some rich pans, apparently, went into it, by their own testimony, but there is nothing in the evidence from which the Court can infer that there was \$3,000 of rich pay in that dump, much less to say the cost

of running the dump through the sluice boxes, which certainly costs more money. So there is no evidence, there is nothing from what anyone can infer that they would have recovered enough gold from that dump that they say existed out there to pay the costs [190] of running it through. So in the final analysis, it is clearly uncertain and speculative as to whether they had any profit for that summer operation in 1942.

I don't know any other way that that can be argued to show that there was any profit in the summer of 1942 but be that as it may, what then? Well, that is not really the point, I don't suppose. The point is: how much money would they have lost had they been allowed, but for the defendant's act, and where is the evidence? Where is the evidence that in their mining operations right here (indicating on map) they say they were, that there was any recoverable ground, profit-bearing ground here, laying there or here or here or here (indicating)?

There is not one shred of evidence in the record that their prospective ground which they would have drilled contains gold in sufficient quantities to make their operation a profitable one. We don't know how much expense they would have incurred in operating in 1943 had they been allowed to operate or continue in 1942. There is no evidence at all of their expenses. Not one bit of evidence which shows their future expenses. There is no evidence as to the price of gold in 1942, unless the Court is

to assume that the price of gold was then what it is now, but I don't think it was. There is no evidence how much gold was in that ground, and there is no evidence as to how much gold was taken out.

So I am certain that the Court is familiar [191] with the basic rules, one of the basic rules of damages, that loss of prospective profits is not recoverable unless it can be determined with certainty.

In the defendant's trial brief, there is case authority to that effect. The Ninth Circuit Court has so stated, quoting American Jurisprudence, Section 21 and Section 23, because the law quite rightfully feels, Your Honor, that we cannot suffer anyone to have verdicts brought in which are mere guesses. And I submit that the loss of plaintiffs' profits from the evidence which they have put into this case is nothing but a hundred per cent and total guess. It is a sheer guess as to how much money they would have made but for the defendant's act. Why, it could go from one dollar or a loss of thousands to a profit of who knows how much. It is absolutely impossible to determine whether they would have made or lost money in their continuing operations. So we can't allow the jury to speculate and sit here and guess. Court after court has held, the Eighth Circuit in *McCormick v. United States Mining Company*, a rather old case but apparently very good law, 185 Federal 748. There the plaintiff was in possession and sued to quiet title to some mining ground. The defendant entered an answer

and was successful in obtaining an injunction prohibiting the plaintiff from continuing to mine the ground, but was required to give a bond to indemnify the plaintiff if the injunction had been wrongful. The injunction was later held to have been wrongfully issued and the plaintiff sued on [192] the bond. It is interesting to contrast the proof which the plaintiff showed there with respect to loss of profits with the plaintiffs' proof in this action. There they had taken detailed samples of the ground, had them assayed, submitted the estimated costs of mining and extracting the ore, the cost of transporting it and smelting it. The Court said, "You haven't submitted enough proof. The law with respect to loss of profits being the basis of recovery in an action for damages is that profit which could have been realized but for the act of the defendant and which are not open to the objection of uncertainty or remoteness may be recovered, but profits depending upon numerous uncertainties and changing contingencies are too indefinite and untrustworthy to constitute a just measure of damages."

That is the case here, too uncertain, too remote, and too speculative.

That is probably the strongest case, factually, which I can cite, because it is clear cut, it is an action for loss of profits from being prevented from mining ground, and there the Court with much more detailed proof said "too uncertain."

Well, there are other cases in the same vein.

There are case after case which hold that unless the operation of the plaintiffs has a past history of profit and that that past history of profit can be projected, then loss of profits are not recoverable, and isn't that very rule applicable here? Here the plaintiffs had operated at a loss. There is no evidence that one day [193] that they had ever operated at a profit, and there is no evidence that they ever would operate at a profit, so I ask the Court to grant the motion and strike from the complaint all claim for loss of profits and for expenses incurred during the 1942 operation.

Mr. Taylor: If the Court please,—

The Court: Mr. Taylor.

Mr. Taylor: —I have followed Mr. Cole's argument with a great deal of interest and also a little bewilderment in regard to citing cases which he claims are in point, especially the one of *New v. Kinser*. That doesn't seem to be any place in point. Neither can I see where *Butterfield v. Snively*, 19 *Northeastern Reporter*, 2d Series, page 284 is in point.

I don't know where Mr. Cole was when the trial was going on, but there was quite a bit of evidence—

The Court: Are you familiar with those cases that you say are not in point?

Mr. Taylor: It is just his interpretation of them. And then the other one, I didn't have it down here—another one in regard to a bond, which I don't believe would be pertinent to this case, your

Honor, but I think we have a case much closer to home and possibly much closer connected with this matter, and that is the case of Kupoff, et al., v. Stepovich, which was appealed to the Circuit Court of Appeals, and I think that that opinion certainly sweeps aside the argument of counsel in this [194] case.

Now, your Honor, I believe that Mr. Cole would say that if you were a farmer and you were planting wheat and you were plowing that that farmer would be operating at a loss all the time, operating at a loss, because from the time he started his operations he didn't start to take in money while he was preparing the soil or while the seed was germinating or while the wheat was growing up, but when he harvested then he might show a profit.

Mining is something similar to this, to farming, because there is always a certain amount of dead work that has to be done before you can reach the harvest or you can bring anything in. In this case, your Honor, five and one-half months were devoted to what they call dead work, although in cleaning out the tunnels and driving and cleaning up the tunnel from here to here (indicating) and then driving from here over into here they did wash the gravel and recovered approximately \$3,400. That was a side issue, but it wasn't the main issue because they knew, Mr. Zukoev knew from working down here for Mike Stepovich a couple of years before that there was a rich pay streak in here. That was why they were willing



to pay  $33\frac{1}{3}$  percent royalty on that, and that is why Mike Stepovich exacted the  $33\frac{1}{3}$  percent royalty, because he knew that there was a high-grade or a rich pay streak there, so this, your Honor, from the time they cleaned that shaft out and over here and then [195] over here (indicating) at Mr. Stepovich's suggestion, he said there was a rich hole. What he wanted to do was guide them away from this side and have them extend their energies the other way, but they did come back over here and did strike it.

Your Honor, we had the drill logs here yesterday, but over the objection of the defendant he excluded the best evidence we could possibly have, your Honor, as to the value of that ground.

Now we have to take the next best evidence, and that is the evidence of experienced miners, such as Mr. Zukoev, Mr. Kupoff, who for years have been engaged in that line of business, and I dare say that lots of the miners of Alaska who have followed placer mining can sample and can test ground and they will arrive within a few cents of what an experienced mining engineer will say is the value of the ground. They can take a piece of quartz and brush it up and pan it out and tell you how much it goes to. They can take the gravel as it goes through and test it.

In this case, your Honor, the testimony is that when they hit this pay strike they knew that they were on it, because then they go 30 feet from the shaft each way. They opened up a face on this

pay streak here 60 feet wide, and from then on they started their thawing of the ground and, as they said, they tested, they panned and panned and panned all the time and [196] never got less than fifty cents a pan, your Honor, and seventy-five and one dollar and more than a dollar. They were on the true pay streak, your Honor, and Fairbanks as a mining center of Alaska has seen hundreds of those pay streaks, your Honor, a pay streak that where one time in the past a stream has run through and deposited the gold in that stream, and which in time the stream has filled up, the overburden come in, and the course of the stream is changed. So there is a possibility, and the jury can take that possibility into consideration, your Honor, that this pay streak runs along that way, your Honor, along where that line shows, and that pay streak can run over clear to the western boundary of that line, your Honor. It can run over to the northern boundary of the line or it can run down to the southern boundary of the line, but it has been prospected down this way (indicating), and probably this streak has turned in some other place. Pay streaks do not always follow straight lines. It may wind like a creek, to and fro, but if they are on it they can usually follow it. So I don't think that Mr. Cole's contention as not having any evidence, your Honor, as to the value there, we certainly have the value. We have shown it and they have shown nothing to the contrary. I think I contended and the evi-

dence shows that 5½ months of their operations there, your Honor, were, as they said, dead work and it is testified to by Mr. Kupoff and by Mr. Zukoev that that was done. [197]

It is not too problematical about the gold that was in the sluice box. Somebody took that gold. We will assume that Mr. Stepovich took that when he evicted these people off of the ground.

Another thing, your Honor, I think that is one of the strongest points in this testimony here as to the value of this Eastern Star Claim is the fact, your Honor, that United States Smelting, Refining and Mining Company before the lease that Mr. Kupoff and Mr. Zukoev had on that property had expired leased that ground from Mike Stepovich for fifty years and it is now under lease to the mining company. They are not going to lease a worthless piece of ground because they are not raising cattle, they don't need it for cattle grazing or raising wheat, because they want what is down underneath there. That is evidence of that, too, your Honor.

Now, I believe, your Honor, that the damages can be shown as to everything that was spent by these men or what they could have earned, should have earned, where the eviction of these men from that mine was wrongful. Absolutely, your Honor, abuse of process, using the Courts for the purpose of putting these people off the ground and keeping them off the ground until the cold weather came and the whole works had frozen up again so they

could not re-enter. Absolutely barred from it, just the same as they put soldiers out to guard it. There is no use going back because they would have had to do over [198] for a period of five or six months the same thing they had done before.

I think, as the Circuit Court of Appeals said, that the plaintiffs should be allowed to put on their evidence, and they criticized the specious objections that were made at the previous trial of this case, and I am relying, your Honor, upon the statement of the Ninth Circuit Court of Appeals that we have shown now exactly what they expected be shown.

The Court: Do you wish any rebuttal?

Mr. Cole: I would like to say that there is no evidence any place that Mr. Stepovich cleaned up those boxes and it hasn't even been inferred, and if he did it is conversional and had nothing to do with this action, because that is barred by the Statute of Limitations long ago.

They are suing for loss of damages, for breach of a covenant of quiet enjoyment, and they haven't shown, incidentally, that gold has a continuity. I think that is very essential to show that there was more gold in the ground. For all we know, unless the Court can take judicial notice of placer formations, but I think if the Court did take judicial notice of placer formations it would find that that type of evidence is very, very untrustworthy as to the future gold-bearing content of the ore. So there is no evidence that there is any gold-bearing,

profitable ore beyond actually where they did operate their mine. Even conceding that, there is no evidence [199] of expense, and there certainly must be some evidence of expense that it is going to cost to take the gold out of there, and be able to show that they could have operated at a profit. Just none of the elements are there, your Honor.

The Court: Mr. Taylor, I believe I understand, in paragraph nine of your complaint, that you do set forth an action for loss of prospective profits in the sum of \$100,000. That is your theory, is it not.

Mr. Taylor: Yes.

The Court: And what is the theory with reference to the \$6,791.29 set forth in the preceding paragraph? What I have in mind is if your clients recover their loss of profits, would that not include the \$6,791 for expense, which would reduce their profits, would it not?

Mr. Taylor: Mr. Stepovich got part of that money, your Honor.

The Court: What is that?

Mr. Taylor: Mr. Stepovich got part of that money, your Honor, and I think we were going to deduct the wages out of it, but I think the groceries and meats——

The Court: What is the theory of recovery? If your clients recovered their loss of profits in the whole mining venture, isn't that all that would be expected to recover?

Mr. Taylor: No, sir. We expected to recover

that which we had expended, which we had carried to a point and then we [200] were stopped, your Honor, from going any further, and by being stopped we lost what we had put into it, also lost what we expected to take out of the mine.

The Court: Yes, but if you hadn't been stopped and you had processed the mine, you would certainly to determine the net profit deduct the expenses, would you not, from the gross take?

Mr. Taylor: Yes, but we were not allowed to do that, your Honor. If we were not allowed to do that, we expect that we should get those back.

Now, under the Federal Rules of Civil Procedure, your Honor, our statement of the case, we set up certain things that were done, certain matters of expense, and then under that, any theory of law that will allow us to recover, your Honor, the jury can bring in a verdict to that effect.

The Court: Certainly. All I am asking is: what is your theory?

Mr. Taylor: Our theory is, your Honor, that we should recover all the money that had been paid out by these men.

The Court: Plus the loss of profits?

Mr. Taylor: Plus the loss of profits, whatever this jury may think the loss of profits are. If it is \$25,000, why, it would be \$25,000 plus or expenses, because the loss of profits, your Honor, would also mean, if the loss of profits was \$30,000, that Mr. Stepovich would have received \$10,000 of it. [201] The defendant would have been recom-

pensed, too. If \$30,000 was taken out, only twenty would go to the plaintiffs and ten would go to Mr. Stepovich. It wouldn't be all profits, your Honor. You would pay the royalty. Besides you would pay the cost of operation.

The Court: Yes, and from the gross amount of gold taken out of the mine, the plaintiffs would be expected, would they not, and intended to pay the defendant the royalty and expected to pay all expenses?

Mr. Taylor: Yes, your Honor, but they were not allowed to do that. They were stopped.

The Court: No, but you are now suing for the loss of profits?

Mr. Taylor: Yes, sir.

The Court: I can't understand your theory, why you expect to recover both your loss of profits and your expenses incurred.

Mr. Taylor: Your Honor, these expenses were for preliminary work. It wasn't the actual mining operations. It was the preliminary work, to open it up so it would be put in a state that it could be processed.

The Court: It was part of the expense in attempting to recover the gold, was it not?

Mr. Taylor: To get where the gold was, your Honor.

The Court: Yes. [202]

Mr. Taylor: I believe we are entitled to both of them. I know the Circuit Court of Appeals did not raise that question. I don't know whether

Mr. Hurley did or not in the case but they have commented quite freely upon it and I think that the matter should go to the jury for whatever theory that they could see that would allow us to recover, because, your Honor, that amount of money that the plaintiffs have paid in is a total loss to the plaintiffs at this time.

The Court: Yes, but they are suing to recover the loss of profits and, if they recover the loss of profits, this wouldn't be a total loss, if they were able to prove loss of profits.

Mr. Taylor: If the jury would say that there was a profit, an anticipated profit of \$50,000, they could deduct the \$6,000, if the Court wants to look at it that way. The Circuit Court of Appeals hasn't looked at it that way.

The Court: I want to look at it in a logical way and see whether I have here anything to submit to the jury. You still believe, do you, Mr. Taylor, that your clients are entitled to the \$6,791.29, plus the loss of profits?

Mr. Taylor: Yes, I sure do.

The Court: You don't think the expenses should be deducted from the gross?

Mr. Taylor: From the gross amount, yes, I would say they might be, if they said there was \$50,000 loss. It is all up to [203] what the jury would say was the profits. That is a matter for the Court to instruct the jury on.

The Court: How do I instruct the jury if I don't have your theory?



Mr. Taylor: I am stating emphatically, your Honor, that my theory is that we are entitled to recover more than we have alleged in there, \$6,700. I am going to move to amend the complaint before the case is over, because we have shown more than that, and I am going to ask to amend for the anticipated profits which would have accrued if we had been allowed to continue with the mining operations. But leave it up to the jury. If they feel that the cost of developing the mine up to the point of production is an expense that should be deducted from the anticipated profits they allow, that is a matter——

The Court: Do you think that is for the jury to decide, whether or not the expense of developing it should be deducted from the gross?

Mr. Taylor: I think the Court could instruct the jury on that. I contend strongly that we have lost the six thousand dollars. I am going to move to amend that to show more, before it goes to the jury, because I think we can show a greater amount than that.

The Court: Let's assume, Mr. Taylor, that the jury should find that if it had not been for the act of the defendant that [204] the plaintiffs would have taken out of the mine \$150,000 worth of gold.

Mr. Taylor: Yes, sir.

The Court: Now, do you think, in addition to that, they should bring in a verdict for the \$150,000 plus the \$6,791?

Mr. Taylor: No, sir.

The Court: Then what is your theory?

Mr. Taylor: I think they should bring in a verdict for \$100,000 plus the costs.

The Court: Do you think, then, that the plaintiffs are entitled to recover their share of the proceeds, plus their expenses in operation?

Mr. Taylor: No, if they had been allowed to proceed, no, I don't think that they would have, but the wrongful acts of the deceased was the reason that we asked for the compensation for his compensatory damages, your Honor, which might include both of them. I am not sure.

The Court: Well, I wish that I could see this case as clearly as counsel for plaintiff seems to see it. I have read, of course, and re-read the Ninth Circuit Case in the first trial, and I am mindful of the fact that the Ninth Circuit wanted these plaintiffs to have their day in Court, wanted them to have a fair trial, and that is what the Ninth Circuit Court and any other Court wants all litigants to have, is a fair trial. [205]

In that case, the Ninth Circuit concluded that the trial had not been fair, and it was sent back for re-trial, and the case has been retried on the part of the plaintiffs. And while the plaintiffs' evidence was being unfolded, I was careful in trying to figure out what do I have to submit to the jury, what instructions do I give the jury to aid them in bringing in a just verdict.

I think it is fair to say that there is a great chance that these plaintiffs have been damaged,

and maybe seriously damaged, but the determination does not stop there, if that were to be determined. Once the liability is established, then we must go to the question of damages, and when we come to the question of damages, I have very grave doubt whether the evidence is such that I can give the jury anything to work with. I don't think that I can say to the jury, "You heard the evidence; just go out now and figure how much the plaintiffs are entitled to recover. Just make a guess."

There is nothing in this evidence to show how deep the so-called pay streak went into the ground, no way of measuring the size of it from the evidence. How can the jury say: "Why, had they been permitted to proceed, they would have extracted so much gold from that pay streak." How could they arrive at an amount of gold, and if they did, which I don't believe they can, how would they then determine the expense of extracting it and refining it and getting it to market? [206]

Mr. Taylor: If the Court please, I would like to set the Court right. There is no expense of refining. That gold comes out as pure gold.

The Court: There is some expense to washing it or sluicing it, or whatever you want to call it. Perhaps "refining" is the wrong word, but there is some expense certainly in recovering it. It is there in the hillside or in the ground. It must be gotten out. Surely I would like it if I had something to submit to the jury, but I don't know

what it could be except, as I said, to just let the jury take the whole facts and say, "Well, these plaintiffs seem like nice fellows and they worked hard out there and they surely are entitled to something, and then let them speculate as to whether it is \$5,000 or \$100,000. There is not evidence, in my opinion, upon which the jury could intelligently base a verdict, and of course that is terribly troubling to me, but because I was in hopes there would be something here that the jury could pass on——

Mr. Taylor: If the Court please, could I just interpose something?

The Court: Certainly.

Mr. Taylor: You mean, is the Court entirely discrediting the testimony of Mr. Zukoev and Kupoff as to the value in that pay streak?

The Court: Certainly not. [207]

Mr. Taylor: That they had taken out a block of ground there that the estimate of the pay was from fifty cents to a dollar or more per pan, and that they had taken one thaw of 12 feet out and they had another thaw of 12 feet that they were prevented from taking out. That requires no supposition or conjecture on the part of the jury, your Honor. That stuff was there and they tested, they panned every foot as they went into it.

The Court: I understood they panned the surface. They drew the crowbar down, or the pick axe down the surface and got samples in that manner.

Mr. Taylor: Six foot up and down, so they would have a fair sample and every day they would pan, time after time they were panning there, your Honor. And that thing is just as well tested right now as if a mining engineer had done it.

The Court: Do you contend they tested it beyond the surface?

Mr. Taylor: No, but the surface receded as they did it.

The Court: How deep did the vein go?

Mr. Taylor: There is no vein, your Honor. There is no vein.

The Court: How deep did the gold-bearing gravel go, according to the evidence?

Mr. Taylor: They were taking six feet so they could get [208] a fair sample, and start and come down and mix the lean gravel with the rich.

The Court: How far back, then, did it go, Mr. Taylor?

Mr. Taylor: They went, as that face receded, as they removed it, every few hours they would take a pan, constantly panning. That is the testimony.

The Court: According to the evidence, what is the area of ground carrying this gold? What is the area of the ground?

Mr. Taylor: They had it opened up on the face to 60 feet wide. Jimmy said it was 62. Nick said it was 60. Jimmy was working down in the dump and Mr. Kupoff was working above.

The Court: That is correct.

Mr. Taylor: And he put in a thaw. They

thawed a little over 12 feet. They removed that and then they put in another thaw and they panned there. They panned the same way so they would get a fair estimate.

That, your Honor, is the accepted and usual way of testing placer ground in drift mining, and it has been for many, many years, and it is accurate, and I think that method is accepted. We had the drill logs, your Honor, to show that.

The Court: We can't talk about something we had here that is not in evidence and might have been helpful if it had been in evidence, but we must deal with the evidence that we have now, that we do have in evidence. What is the evidence, Mr. Taylor, [209] that we do have as to the quantity of the gold-bearing dirt?

Mr. Taylor: Your Honor, the quantity we know that there was taken out from that (indicating) place was 60 feet long, 12 feet wide, and 6 feet deep. That was a matter of 4,320 cubic feet. That was 170 yards. Also then in the face after that was removed, and they tested the next face of it and put the steam pipes in again, they pounded them in, and this next block they were still in the pay streak ground, so you could say it was 24 or 25 feet wide, 60 feet long, and 6 feet deep. But then, the way pay streaks run, that pay streak could, your Honor, run on to the northerly boundary.

The Court: Surely, it could.

Mr. Taylor: The jury can decide.

The Court: It could go back, I suppose, miles underground, but I don't know what that has to do with it.

Mr. Cole, I have permitted counsel to argue evidentiary matters. I would be glad to hear from you as to what the evidence shows concerning the quantity of the gold-bearing gravel, as shown by the evidence.

Mr. Cole: There is clear testimony that they operated clear down through here (indicating), and so forth, and then came back and started mining in this area (indicating). There is some testimony that they took some pans down there. They never weighed them, incidentally. Just look at the gold and tell how valuable it is in the pan, apparently.

There is testimony that they were mining in this area here (indicating) shown on their exhibit and Identification Exhibit B, and there is testimony that they had taken some of that out and they sluiced it, but there is no actual evidence as to how valuable this ground was, any more than their testimony of their panning, but they had sluiced some of it and they had also had a clean-up on August 8th. That is shown in the record, here and there, and Exhibit S shows they had a clean-up and deposited approximately \$1,300 on August 8th.

You will recall Mr. Zukoev's testimony that they hit this so-called rich pay, he said, the first part of June.

The Court: Yes, he changed his testimony.

Mr. Cole: And then he changed his testimony

and said some time in July and they had twenty days in there they were working and sluicing and they came out with twelve hundred and thirteen hundred dollars. So the query is just how valuable this really was. But they don't go on and say, they have never shown for one moment that any of this area lying beyond the face which they had exposed contained gold—not only contained a little gold, but contained gold.

There is no evidence of drill holes or any samples beyond just exactly what they had exposed, so how is it possible to know whether there is gold laying the next foot back?

There is no testimony that they would have stopped operating had they found it. The only testimony is that they say they [211] found some—really what it is, when all terminology is cast aside, they found some better ground than they had found in their operations in the prior months of that mining season.

There is no evidence that it is rich pay. They testified that it is just a little better ground. That is what it amounts to, and when you cast aside their common terminology of pay streaks and rich pay, it is no more than they found a little better pay than they had been finding. I hope so, because they had been operating at a tremendous loss until they found this area. But there is certainly no testimony that any place, even that this gold right here (indicating) was profitable. There is no set-off of this gold right here in this area with the expense of



mining the gold in this area. We don't know whether this was profitable even, and we certainly, as the Court pointed out, don't know that there was any gold whatsoever lying beyond that which they had actually exposed, much less the cost of excavating any gold which they had not exposed, and how anyone can figure profit and loss without even knowing the amount of the income, and I use the income in the profit and loss sense—gross income, how you can determine profit and loss without knowing gross income and expense, is beyond me, and I think it is nothing but a pure, out-and-out guess as to whether they would have made one red dime even in the area they were mining so-called rich pay or the area which they hadn't exposed.

I think it is quite proper to strike their claim for any——

Mr. Taylor: Your Honor, may I point out——

Mr. Cole: I also, I don't think it is necessary to comment on the many things, your Honor, which Mr. Taylor talks about which aren't in the record, such as the F. E. and mining and leasing the ground and those things that are extraneous, so I won't even comment on them.

Mr. Taylor: If the Court please, I did want to comment upon this deposit that was made on August 8, 1946. That clean-up was made considerably before that, because that was the clean-up which Mike Stepovich took and brought to town and Mr. Zukoev had to come in town to get a lawyer to get the——

The Court: Is that in the evidence, Mr. Taylor?

Mr. Taylor: Yes, sir. He came to town and to get the money and then put it in the bank. Mr. McGinn, the attorney, made Mr. Stepovich, so that clean-up was considerably prior to the 8th of August. The deposit was the 8th of August, but Mr. Stepovich had brought the money in and was not giving it to them.

The Court: What year, Mr. Taylor?

Mr. Taylor: 1942.

The Court: You said 1946.

Mr. Taylor: No, 1942, your Honor.

The Court: No wonder I was confused. [213]

Mr. Taylor: Mr. Stepovich was dead in 1946.

Mr. Cole: As the Court knows, there is no such evidence in the record.

Mr. Taylor: Then, also calling the attention of the Court to the testimony of Mr. Zukoev and Mr. Kupoff that when they got 12 feet in there that the pay was getting better. That is their testimony. Fifty cents a pan, which is the lowest they claimed they were getting at that time. A pan is a shovelful. There are several shovelfuls to the cubic foot, 27 cubic feet to the yard. At 50 cents a pan, it would be \$94.50 a cubic yard, your Honor. If they couldn't make a profit with that—but they said lots of pans were 75 cents and a dollar and the pay was getting richer as they got in. I think that we have shown a very high value on it. I think that 50 cents a pan, your Honor, is considered in this country to be exceptionally rich ground.

Mr. Cole: There is not one shred of evidence as to how much it cost them to move one yard.

The Court: In answer to one of Mr. Taylor's questions whether the Court was disregarding the testimony of the two plaintiffs, Mr. Kupoff and Mr. Zukoev, I say certainly not, and I have no reason to, and I don't doubt their testimony in any respect, and for this particular motion I am certainly assuming as correct and believing that the plaintiffs' testimony as to the value of the ore that they panned ranging from 50 cents to \$1.80 per shovelful or panful, I am believing that to be true. [214]

Mr. Taylor: Your Honor, I don't like to object, but this was not ore, your Honor. This is frozen gravel and dirt.

The Court: Frozen gravel and dirt, and I suppose there is some gold in it, too?

Mr. Taylor: No ore.

The Court: No gold?

Mr. Taylor: Gold, yes.

The Court: You just said frozen gravel and dirt. I was just wondering. Perhaps gold, too?

Mr. Taylor: Yes, your Honor. I thought it might be misleading to use the word "ore."

The Court: I am sorry if I misused the word "ore." I suppose if you said that actually what it contained was dirt and gravel, that that isn't correct either. It contains more than dirt and gravel allegedly.

So what I am trying to do is see whether there is anything I feel I can possibly submit to the jury

and, if I can, I am going to do it, but right now I would have no notion of how to instruct that jury.

Mr. Taylor: Your Honor, possibly respective counsel could submit requested instructions.

The Court: Do you have any requested instructions ready at this time?

Mr. Taylor: I haven't right at this time, your Honor. [215]

The Court: Did you file a trial brief in this case?

Mr. Taylor: There have been so many briefs filed in the case I didn't believe there would be much necessity for any more.

The Court: Those things would be very, very helpful to the Court.

Mr. Taylor: I don't think I did, your Honor.

The Court: I am going to reserve decision on the motion. We have been in session for an hour and twenty minutes, and we will take a 10-minute recess.

Clerk of Court: Court is recessed for ten minutes.

(Thereupon a ten-minute recess was taken.)

(The jury was brought into the courtroom and took their places in the jury box.)

Clerk of Court: Court is reconvened.

The Court: Gentlemen, I have some remarks that I want to make in the absence of the jury but the jury is now in the box. Will counsel please approach the bench?

(Thereupon counsel approached the bench,

and the following ensued out of the hearing of the jury):

The Court: I am of the opinion that there is great merit to the defendant's motions, but in view of the gravity of the situation I am going to reserve ruling and in the meantime I am trying to figure out what I might submit to this jury on the evidence that is so far in the record. It is fraught with problems, as far as I am concerned. As I say, I feel that I should grant the motion, [216] but I am not going to at this time, at least.

(Thereupon the discussion at the bench was concluded, and counsel resumed their places at counsel table.)

The Court: Mr. Cole, are you ready to proceed?

Mr. Cole: Yes, your Honor. Call Vuka Stepovich.

### VUKA RADOVICH STEPOVICH

the defendant, took the stand in her own behalf, and after being duly sworn, testified as follows:

#### Direct Examination

Q. (By Mr. Cole): What is your name, please?

A. Vuka Radovich Stepovich.

Q. And you are the widow of Mike Stepovich, Senior?

A. Yes, sir.

Q. And you are the defendant in this action?

A. Yes.

Q. How long have you been in this country, Mrs. Stepovich?

A. I came in 1929.

Q. Where did you come from?

(Testimony of Vuka Radovich Stepovich.)

A. From Jugo-Slavia.

Q. Is that where you were born?

A. That is where I was born.

Q. Where did you meet Mr. Stepovich?

A. In Jugo-Slavia. [217]

Q. Were you married there?      A. Yes.

Q. And then he and you returned to this country?      A. Yes.

Q. Where did you go when you first came?

A. I came here.

Q. Fairbanks?      A. Fairbanks.

Q. Did you live here in Fairbanks at first, or where did you live?

A. Yes, for about one month.

Q. And then where did you go?

A. We went to the low end of the Fairbanks Creek.

Q. You went to Fairbanks Creek after you came here?      A. Yes.

Q. What year was that?      A. March '29.

Q. Was that where Mr. Stepovich was living?

A. Yes.

Q. And where is Fairbanks Creek from here? Just how do you get there?

A. You go to Summit, 20-mile Summit on the Steese Highway, and then you go right and go maybe eight to ten miles.

Q. Down to the creek? [218]

A. Down to the Fairbanks Creek.

Q. How long did you live out there?

A. I lived here and there for about six years.

(Testimony of Vuka Radovich Stepovich.)

Q. Out on the creeks?

A. Out on the creeks.

Q. With Mr. Stepovich?

A. With Mr. Stepovich.

Q. Did you live there the year around?

A. Yes, for six years I lived out at the creeks all the time. I just come for a visit in Fairbanks.

Q. When did Mr. Stepovich come over to this country?

A. I am not exactly sure when, but it was sometime in 1894 or 1895, something like that.

Q. Where did he first go when he came to the United States?

A. Fresno, California, he came first.

Q. And where did he go from there?

A. He went to Dawson with the other gold prospectors.

Q. What year was that about?

A. I couldn't tell you that—1897 or 1898.

Q. What did he do over there in Dawson?

A. He did mostly freighting there. He had lots of horses and sleds and he did some mining, not very much. That was his story that I usually hear all the time in talking with the other old-timers.

Q. And then what happened over there?

A. He lost all his horses from the sickness and he had only one mule left, and then he heard about the Fairbanks strike, and he had one mule and one horse, and he came in Fairbanks—

Mr. Taylor: Just a moment. For the sake of saving time, I am going to object to the narrative

(Testimony of Vuka Radovich Stepovich.)

of something that happened many, many years ago, before Mrs. Stepovich came up here.

The Court: I will allow a reasonable latitude in the foundation or preliminaries, but maybe you are going a little far.

Mr. Cole: I am just bringing Mr. Stepovich into this area.

The Court: Proceed.

Mr. Cole: Yes.

Q. (By Mr. Cole): So then what happened?

A. He came in this country and he went out to the Fairbanks Creek and he owned some property there, on Seven Below, and mining there, and I think the cabin is still standing there, but he sold it to the English Company and then he moved to the lower end of the Fairbanks Creek and he mined there before he came to the old country.

Q. And you two began living out there about 1929? [220] A. 1929.

Q. Did you and Mr. Stepovich have any children? A. Yes.

Q. And how many?

A. Four children. My older boy is in Wisconsin now taking dentistry, and my younger boy also taking dentistry in San Francisco. My one daughter is a kindergarten teacher in California, and my young daughter is a junior in college.

Q. Where were these children born?

A. They were born in Fairbanks. It happened they were born in a log cabin at Fairbanks Creek.

Q. Where you were living?



(Testimony of Vuka Radovich Stepovich.)

A. That is where I was living.

Q. How long did you live out there then? Six years?

A. I didn't live there all the time. I lived one year on the tungsten mine, head of the Gilmore Creek, about fourteen miles from town.

Q. When did you come into Fairbanks to live?

A. In 1936, when my older boy was old enough to go to school.

Q. You lived in town during his school year?

A. Yes. In the summertime we go out to the creeks.

Q. Mr. Stepovich was mining on the creeks all this time?

A. Yes, here and there, prospecting and mining.

Q. Do you know where the Eastern Star Mining Association claim was?

A. Yes.

Q. Where was that?

A. It was right here on Fish Creek. They call it Slippery Gorge.

Q. Is that the confluence of Slippery Gorge Creek and Fish Creek?

A. Yes, Slippery Gorge goes into Fish Creek.

Q. How far did you live from that?

A. My last home was maybe nine and a half.

Q. Were you ever on this Eastern Star mining claim?

A. Yes.

Q. Do you recall the mining season of 1941, Mrs. Stepovich?

A. Yes.

Q. And did Mr. Stepovich mine that year?

A. Yes.

(Testimony of Vuka Radovich Stepovich.)

Q. Where was he mining?

A. In the Eastern Star.

Q. Eastern Star?            A. Yes.

Q. During that time that he was mining there, were you ever on the claim? [222]

A. Yes, in the summertime.

Q. How often?

A. Sometimes I wouldn't go there for a week and sometimes every day.

Mr. Cole: I would like to have this marked.

(The photograph was marked Defendant's Identification B.)

Clerk of Court: Defendant's Identification B.

Q. (By Mr. Cole): Mrs. Stepovich, I will hand you Defendant's Identification B and ask you to observe it, please.

Have you observed it?            A. Yes.

Q. Can you identify it?            A. Yes.

Q. What is it?

A. Oh, it is a gin pole and a dump and sluice boxes and buildings.

Mr. Taylor: Just a moment. I object to him showing it to the jury at the present time.

The Court: That is correct.

Mr. Cole: Very well.

Q. (By Mr. Cole): On what claim was that?

A. That is the Eastern Star.

Q. And is this the claim which Mr. Stepovich leased to the plaintiffs?            A. Yes.

Q. Is it a true and accurate representation of the claim and what appears on it?

(Testimony of Vuka Radovich Stepovich.)

A. Yes, that I can see.

Q. You saw the claim in 1941? A. Yes.

Mr. Cole: I move its admission into evidence.

Mr. Taylor: We object, your Honor. It is a little remote, taken a year prior to the leasing of the property to these plaintiffs.

The Court: It will be received.

Clerk of Court: Exhibit No. 1.

(The photograph previously marked Defendant's Identification B was received in evidence and marked Defendant's Exhibit No. 1.)

Mr. Taylor: For what purpose, your Honor? I would like to know for what purpose it is received.

The Court: It depicts, according to the witness, the condition there at the mine in the year 1941.

Mr. Taylor: I still renew my objection as incompetent, irrelevant and immaterial, has no bearing upon the issues as to [224] what took place in 1942.

Mr. Cole: This is Defendant's Exhibit 1 (showing the photograph to the jury).

Q. (By Mr. Cole): Do you know where the shaft was on this claim?

A. It is right behind that building. It is about ten feet maybe from the boiler house.

Q. Now, is this the boiler house here?

A. Yes.

Mr. Taylor: I object to any further questions unless they show that this is the only shaft on the ground. There has been testimony that there were several other shafts.

(Testimony of Vuka Radovich Stepovich.)

The Court: I think if you will have the witness spell out as to the time, you may proceed.

Mr. Cole: Yes.

Q. (By Mr. Cole): Where was the shaft that Mr. Stepovich mined from on this claim in 1941?

A. It was right here (indicating).

Q. Was that the same shaft which Mr. Stepovich leased to the plaintiffs in this action?

A. Yes.

Q. In February, 1942? A. 1942. [225]

Q. Did Mr. Stepovich mine during the mining season in 1942? A. No.

Q. Do you know why?

A. Well, I didn't want him to, because his health wasn't very good.

Q. What was wrong?

A. Well, he had a heart ailment for several years and he wasn't getting any better. I felt he was getting worse instead of better, and the doctor wouldn't permit him to do any work, physically or mentally. It was just a plain risk.

Mr. Taylor: Now, just a moment. Your Honor, we are going to object to this line of answers to the questions. I think that it calls for a conclusion, conjecture, supposition, and hearsay.

The Court: I will permit it to stand so far. You may proceed.

Q. (By Mr. Cole): Now, did you go out to Fish Creek in 1942? A. Yes.

Q. What part of the year?

A. That year I didn't get out before July.

(Testimony of Vuka Radovich Stepovich.)

Q. Why was that?

A. Well, my boy was sick and then we lost a house in the fire. There were so many things that I couldn't leave [226] Fairbanks very well.

Q. When did you come in from the claim, in from Fish Creek, in 1942?

A. In September, when the school started.

Q. Do you know what time in September? In the early part, or middle part?

A. I think it was the first part of September, as much as I can remember.

Q. And how long did you remain here in Fairbanks?

A. Well, we left, all family, for "Outside" on October 8th.

Q. Did Mr. Stepovich go with you?

A. Yes. I am not really positive of the date of October, but that was always in my mind that we left on October 8th, but maybe I am mistaken right now, but it was the first part of October that we left Fairbanks.

Q. Did Mr. Stepovich ever tell you anything about this lease which he had entered into between him and the plaintiffs in this action?

Mr. Taylor: Just a moment. We object, your Honor; it would be hearsay and self-serving, not admissible.

The Court: I have in mind the particular Territorial Statute that seems to authorize this testimony.

(Testimony of Vuka Radovich Stepovich.)

Mr. Taylor: The lease speaks for itself, too, your Honor. [227]

The Court: But I will permit the answer.

Mr. Cole: Will the reporter please read the question to the witness?

(Thereupon the reporter read the last question.)

The Witness: Yes.

Mr. Taylor: I think I am going to object, your Honor. The proper foundation has not been laid to show that she is familiar with the terms of the lease. I think that should be shown first, your Honor, and I still renew my objection to hearsay testimony which would be self-serving in this case and is not admissible as evidence, your Honor, under any rule of law that I know of.

The Court: Are you aware of the Territorial Statute?

Mr. Taylor: I would sure like to see it, your Honor. I move we take a recess at this time. It is just twelve o'clock.

Mr. Cole: Your Honor, I think we could finish the direct-examination of this witness if we had three or four minutes. I will be happy to read the statute to Mr. Taylor at this time if he wants me to.

The Court: Do you have it handy to read?

Mr. Cole: Yes.

Mr. Taylor: I would like to read the statute and not from that book, Mr. Cole.

The Court: You may proceed.

(Testimony of Vuka Radovich Stepovich.)

Mr. Cole: Will the reporter please read the question again? [228]

(Thereupon the reporter re-read the last question.)

The Witness: Yes.

Q. (By Mr. Cole): What did he say?

Mr. Taylor: Just a moment, your Honor. The proper foundation has not been laid as to when and where and who was present at that conversation. It is too indefinite in point of time and place.

The Court: Very well. Objection overruled. She may answer.

Q. (By Mr. Cole): Mrs. Stepovich, what did he say?

A. Well, he said that, I asked him, first, "What is the matter?" I can see on him that something was worrying him, and he said that he believed that the boxes, they were touched before the clean-up. That means that somebody was touching the gold that was in the boxes.

Q. Then he went "Outside" in October?

A. Yes.

Q. Where did you finally reside?

A. We came to Seattle and stopped about a week and then we left for California and we lived in San Diego, stayed there for the Christmas vacation, and we bought a car and we drove up to San Jose, California, and stayed there for a week, and then [229] before the New Year we moved to Los Gatos, California, put the kids in school and bought

(Testimony of Vuka Radovich Stepovich.)

a home and that is the home that I am living in now.

Q. And in what year did Mr. Stepovich pass away? A. In 1944, in September.

Mr. Cole: That is all, your Honor.

The Court: It is twelve o'clock. We will take the noon recess. Mr. Hall, do we have anything at 1:30?

Clerk of Court: Yes, we do, your Honor.

The Court: Very well. This case will be resumed at two o'clock and Court will recess until 1:30. The jury will please heed the admonition I have previously given you.

Clerk of Court: Court is recessed until 1:30. This case is recessed until 2:00 o'clock.

(Thereupon the trial of this cause recessed at 12:00 noon, to resume at 2:00 p.m.)

Clerk of Court: Court is reconvened.

The Court: Are the parties ready to proceed?

Mr. Taylor: The plaintiffs are ready, your Honor.

Mr. Cole: The defendant is ready, your Honor.

The Court: Very well.

Mr. Cole: I would like at this time, your Honor, to ask permission to examine Mrs. Stepovich for another question or two.

The Court: Yes. She hasn't been turned over for [230] cross-examination yet.

Mr. Taylor: No.

Q. (By Mr. Cole): Mrs. Stepovich, in Defendant's Exhibit No. 1 there appears a large white



(Testimony of Vuka Radovich Stepovich.)

mass approximately in the center of the picture. Do you recall seeing that in 1941 when you were there?

Mr. Taylor: Just a moment. Your Honor, we are going to object because it has no bearing upon this case. None of the plaintiffs had any connection with that property in 1941.

The Court: I will permit her to answer to establish the condition as of that time. If you want to come over here, Mr. Taylor, you have a right to.

Mr. Taylor: No.

Q. (By Mr. Cole): Do you recall seeing this there in 1941?

A. Well, I don't think so, no, not in 1941.

Mr. Cole: That's all.

Your Honor, I wish to point out that this Exhibit 1 of the defendant is not introduced for the purpose of showing that this particular mass which appears here in white was on the dump in 1941. It is introduced for the purpose of showing the general nature of the terrain surrounding the claim, the fact that the boilerhouse appears on it, and another house, the gin pole and the sluice boxes. That is the sole purpose for its submission at this time. [231]

You may take the witness, Mr. Taylor.

#### Cross Examination

Q. (By Mr. Taylor): Mrs. Stepovich, how many shafts were there on the Eastern Star Claim?

A. What I can remember——

(Testimony of Vuka Radovich Stepovich.)

Q. What?

A. What I can remember, there are three shafts.

Q. There are three shafts. This picture was taken in 1941, was it?

A. I don't know when it was.

Q. What?

A. I don't know when it was taken.

Q. You don't know whether it was taken in 1941, then, or not?

A. I don't know when the picture was taken.

Q. And isn't it a fact at the other shafts they had a boiler house and a gin pole also?

A. Yes.

Q. What is that white mass that shows up there? Do you know what that is?      A. Yes.

Q. What?

A. It must be dirt from under the ground.

Q. Do you know what part of the claim this is on?

A. Well, I recognize the boiler house and I know where [232] the boilerhouse is and I approximately know where the dump is.

Q. And what shaft is that, Mrs. Stepovich?

A. The third shaft.

Q. The third shaft?      A. Yes.

Q. And in 1941 was that dirt—was that put through the sluice box?      A. No.

Q. What?      A. No.

Q. When was it put through the sluice box, or was it ever put through the sluice box?

A. In 1941?

(Testimony of Vuka Radovich Stepovich.)

Q. Yes, ma'am. A. Not that dump.

Q. What? A. You confuse me on the dates.

Q. Will you point out to me where the sluice boxes are there, Mrs. Stepovich, please?

A. This is the hopper and then you can see the box in the picture there.

Q. You see the hopper up here (indicating), don't you? A. Yes.

Q. And you don't see the sluice boxes though?

A. No. [233]

Q. And this dirt then had been piled in the hopper? A. Yes.

Q. Do you know whether that dirt and gravel was in the hopper in 1942? A. No.

Q. So you don't know whether this picture was taken, then, in 1941, or not, do you?

A. No.

Q. So it might have been 1938 when they were working there? A. Not in 1938.

Q. Or 1937, when Mr. Stepovich was mining there?

A. No. It was taken sometime either 1941 or 1942, because that is when we have the boilerhouse, that particular one.

Q. Wasn't that boilerhouse there in 1938 and 1939? A. No, not that one.

Q. Do you know when Mr. Erickson was operating on that claim? A. Yes.

Q. And did he use this boilerhouse——

A. No.

Q. ——and this gin pole?

(Testimony of Vuka Radovich Stepovich.)

A. No, not that boiler house. I don't know if he did use that particular gin pole. If he did, it was in another place.

Q. And do you remember when Mr. Tavitoff operated on the Eastern Star Claim? [234]

A. Yes, I remember when he operated, but I never been there.

Q. Do you know how much money Mr. Tavitoff took out there?      A. No.

Mr. Cole: That is irrelevant, your Honor, and not proper cross-examination.

The Court: She has answered "No."

Q. (By Mr. Taylor): Do you know how much money Mr. Stepovich took out of this dump that shows here?      A. No, I can't recall right now.

Q. Was this claim ever in your name, Mrs. Stepovich?      A. On my name?

Q. Yes, was the title in this claim ever held in your name?

A. There was two claims on Slippery Gorge, but I don't remember if the Eastern Star was ever in my name.

Q. You are sure that this picture was taken at the time that Mr. Stepovich was operating on that claim?

A. I am sure that that shed and that boiler-house was built when he was in that shaft.

Q. Now, do you know how long the drifts were down below?

A. No, I never have been in a drift in my life.

(Testimony of Vuka Radovich Stepovich.)

Q. And do you know how far it was to the bottom of the shaft? [235]      A. No.

Q. How long did Mr. Stepovich mine out of that shaft?

A. If I want to tell the truth, I can't remember.

Q. And you also cannot remember when this picture was taken?      A. No.

Mr. Taylor: That is all.

#### Redirect Examination

Q. (By Mr. Cole): Mrs. Stepovich, this picture might have been taken at any time after 1941, might it not?      A. Yes, any time after 1941.

Q. But you are sure that this is the boilerhouse and the shaft and the gin pole?      A. Yes.

Q. And the other workings which were on the Eastern Star Claim?

A. Yes, on the last shaft that my husband sank on the Eastern Star.

Q. Did he lease this particular shaft?

A. He did.

Q. And area to the plaintiffs?      A. Yes.

Mr. Cole: That is all. [236]

#### Recross Examination

Q. (By Mr. Taylor): That is one of three shafts that is on the ground, is that right?

A. Yes, that is what I remember.

Mr. Taylor: That is all.

Mr. Cole: That is all, Mrs. Stepovich.

(Witness excused.)

Mr. Cole: At this time, your Honor, I would like to read into the record portions of the official transcript of the record in the first trial of this action.

Mr. Taylor: Just a moment. Your Honor, we are going to object to that upon the grounds that we have been refused permission to read into the evidence the testimony of Mr. Ulmer. We moved to do that, your Honor, and I think the rules should apply the same to Mr. Cole.

The Court: There is no doubt the same rule should apply to all parties, but what is it you seek, Mr. Cole, and do you have the proper foundation?

Mr. Cole: I am reluctant to introduce the entire transcript.

Mr. Taylor: I will stipulate the entire transcript may be entered, your Honor.

Mr. Cole: I won't stipulate to that, your Honor. I am not going to put in the entire transcript of the earlier case.

The Court: Mr. Cole, you merely said what you want to do [237] is read a portion of the transcript into the record.

Mr. Cole: Yes.

The Court: I don't know that that is proper.

Mr. Cole: And I wish to introduce it as an admission of plaintiffs in this action, and it is admissible as an exception under the hearsay rule, and the testimony is being admitted under official records exception to the hearsay rule.

The Court: I think that you should spell out

whose testimony and under what circumstances you wish to use it.

Mr. Cole: Yes. I wish to introduce——

Mr. Taylor: Just a moment. Your Honor, I am going to object to him testifying now before a jury what he is going to introduce in evidence.

Mr. Cole: I didn't say what I was going——

The Court: I want to see whether he can lay the foundation for the exception to the hearsay rule that will permit the reading of a portion of the transcript.

Mr. Cole: Mr. Taylor, will you stipulate that is the official transcript of the testimony of the prior hearing?

Mr. Taylor: Yes, and I will stipulate also that the whole thing may be introduced into evidence.

Mr. Cole: I won't stipulate as to that, but I will accept your stipulation that this is the official transcript. I wish to make it clear at this time that I am not introducing this transcript in its entirety, only certain portions of the testimony [238] of Nick Kupoff, one of the plaintiffs, and that is being introduced—first of all, while his testimony is hearsay, it is admissible under the admissions exception to the hearsay rule, and I may introduce his testimony in this action through the official transcript, and that is a recognized exception to the hearsay rule.

Mr. Taylor: If the Court please, Mr. Kupoff has been on the stand. He could have been asked when he was up there as to whether he made pre-

vious statements. Such was not done, and I do not believe that it is permissible now to read a bare narrative of something out of the record, without giving Mr. Kupoff an opportunity to state whether or not he has made those statements.

The Court: For what purpose are you offering this, Mr. Cole?

Mr. Cole: Substantive evidence of the contents of the statements.

The Court: You are not offering it for impeachment purposes, as suggested by counsel?

Mr. Cole: No, sir.

The Court: Because, Mr. Taylor, as I understand your objection, it is that he hasn't laid the proper foundation for impeachment purposes.

Mr. Taylor: That is right, too, and under any view of it, your Honor, unless we can introduce the whole thing, I don't think that the defendant can pick and choose. He can't take the ripe melons and leave the unripe ones lay. If he is going to [239] take the record, let him take the whole record, but if he is fearful of the whole record, lay out the whole record.

The Court: I don't think there is anything to require a party who seeks to put in a portion of the former testimony to put it all in. I don't think that is the law.

Do you have something else you can go on with when we have the jury here, and I can reserve ruling on this, Mr. Cole? I don't want to disrupt your plan of putting in the evidence. Is this the next thing that you would like to go into?



Mr. Cole: I think we perhaps may be able to take the testimony of one other witness before the admission of this, safely.

The Court: Very well, you may proceed with your witness, please.

Mr. Cole: I call Earl Beistline.

EARL H. BEISTLINE

called as a witness on behalf of the defendant, after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Cole): What is your name, sir?

A. Earl H. Beistline.

Q. Where are you employed, Mr. Beistline?

A. University of Alaska.

Q. How long have you been employed there?

A. I have been at the University of Alaska since 1946.

Q. In what capacity are you employed now?

A. My present capacity is Dean of the School of Mines.

Q. Have you been with the School of Mines since 1946?

A. Yes, first as an instructor, until 1949, and then in 1949 I was made Dean of the School of Mines, my present position.

Q. Are you married?

A. Yes, I am married to Dorothy Herring, a local girl.

Q. And do you have any children?

(Testimony of Earl H. Beistline.)

A. Yes, I have two sons and one daughter.

Q. Where do you live?

A. I live at Four Mile on the College Road, just east of the campus of the University.

Q. Have you had any formal training or education in mining and mining operations?

A. Yes, I have.

Q. And what has that been?

A. I graduated from the University of Alaska in 1939, with the five-year degree of Bachelor of Mining Engineering. In 1947 I received the degree of Engineer of Mines from the same University.

Q. What is required for the degree of Engineer of Mines?

A. Engineer of Mines is a professional degree, and one must have worked in the field for at least five years with jobs of responsibility, and in addition write a thesis on some phase [241] of his work during that time.

Q. Did you write a thesis for your degree?

A. Yes, sir.

Q. What was that thesis on, or its title?

Mr. Taylor: Just a moment. Your Honor, we are going to object as an unnecessary attempt to qualify this witness. I will stipulate that he is qualified as a mining engineer.

The Court: I don't know whether counsel wishes to rely on the stipulation or whether you wish to establish his qualifications.

(Testimony of Earl H. Beistline.)

Mr. Cole: I would prefer to establish his qualifications, your Honor.

The Court: You may proceed.

A. The title of the thesis was dredge sampling and clean-up procedure. The entire paper pertains to dredge valuations, placer-mining valuations.

Q. (By Mr. Cole): What practical training or experience have you had in mining and mining operations?

A. Prior to graduation in 1939 I worked for several placer-mining companies in this area. I had worked for the Alaska Juneau Gold Mine at Juneau. After graduation, I worked for the United States Smelting in their Fairbanks office for about two years. During that time I started out as a laborer, worked in the thawing, stripping, the dredging, was a mill man, and in 1941 I went into [242] active service. I remained in active service until 1946. At that time, I came back, worked for the Territorial Department of Mines for a short time, and then starting teaching in about March of 1946. The summer of 1946 I was dredge engineer and planner for the Brinker-Johnson Company, a placer operator located at about 100 miles east of Fairbanks.

Since that time, during the summer months, I have operated myself and I have worked for a number of companies in a consulting capacity.

Q. Are you a member of any professional organizations?

(Testimony of Earl H. Beistline.)

A. Yes, sir. The American Institute of Mining and Metallurgical Engineers, also a registered mining engineer for the Territory of Alaska, a member of the American Association of University Professors, the American Society of Engineering Education. There are two or three more, perhaps, but about the same type professional organizations within the fields of education and mineral industries.

Q. Are you acquainted with the various methods by which gold is mined? A. Yes.

Q. What are those methods, principal methods?

A. The mining of gold can probably be classified into two general forms: lode mining and placer mining.

Q. What is the reason for those two principal distinctions? [243]

A. Primarily the characteristic of the deposits. In other words, you have in lode mining a case where gold is in a solid rock, associated quite often with quartz.

Mr. Taylor: Just a moment. I am going to object to this dissertation. I don't believe that hard-rock mining enters into this case in any manner whatsoever. I think he should confine his dissertation to placer operations.

The Court: Perhaps this is his way of best explaining to the jury the placer operation to show the two different types.

Mr. Taylor: It is quite a long and circuitous way.

(Testimony of Earl H. Beistline.)

The Court: I think it is proper. He may proceed.

A. (Continuing) In lode mining, the gold is contained in solid rock. To recover the gold it is necessary to drill the rock, to blast the rock, to transport the rock to a recovery plant, such as a mill. In this mill crushing and grinding takes place, the gold is released and then recovered. Essentially, now, very briefly, that is what we mean by lode mining.

Q. (By Mr. Cole): And what about placer mining?

A. Placer mining consists of mining minerals or metals that are not in place. If we have a metal such as gold that is mixed with gravel, that gold has been transported to that position, the mining of that type of deposit is known as placer mining.

Q. When you say "not in place," what do you have reference [244] to, Mr. Beistline?

A. I perhaps could explain that best by drawing a sketch and showing the formation of a placer deposit.

Q. Very well. You may be permitted to.

Mr. Taylor: We object, your Honor. I believe these sketches have been ruled out here. I think he can verbally state what it is.

The Court: I don't know what sketches have been ruled out, Mr. Taylor, but I certainly will permit this demonstration.

Mr. Taylor: I object to it unless it is an illus-

(Testimony of Earl H. Beistline.)

tration of the placer operations, your Honor, on the Eastern Star Claim.

The Court: I understand the witness is about to give the general placer operation.

Mr. Cole: Yes, sir.

Q. (By Mr. Cole): Mr. Beistline, if you will just illustrate the general characteristic of gold, its location in a placer formation, and illustrate——

Mr. Taylor: Just a moment. Your Honor, to save time, I would move that he confine his illustrating to drift mine placer operations.

Mr. Cole: This is preliminary. We will do that, too.

The Court: You may proceed and, of course, Mr. Taylor, you will be given an opportunity to cross-examine.

Mr. Cole: Yes, indeed. [245]

The Court: Proceed.

A. What I am going to try to demonstrate here is the way that a placer deposit is formed, whether it be drift mining, bulldozer operations, or dredging, comes, if you have a full understanding of the formation of the deposit,——

Mr. Taylor: Just a moment. I am going to object to that, because that would be mere conjecture and conclusion, your Honor, as to how they are formed. I think if he shows how they are after they are formed, I will withdraw the objection. It would be just merely hearsay, something he has read out of a book, as to how they were formed.

(Testimony of Earl H. Beistline.)

I don't think it would be admissible in evidence, in this case.

The Court: He may proceed.

A. (Continuing) In the formation of a placer deposit, the first thing you have to have is a source of metal or mineral. You recall now the definition we gave of lode mining, where we would have a mineral deposit, and this could well represent now a mineral deposit, and this (indicating) a mountain, in a manner like so. Perhaps if you were to look at a mountain and a valley and imagine a plane cut vertically through, you would see the mountain here, and then you would see a vein deposit here (indicating), and down here you would see a stream flowing. If you were to look at it from an airplane you would see the top of the mountain at a point here and here (indicating), and you would see a stream flowing. [246]

Now, to form a placer deposit, the first thing that must exist, after you have the mineral source, would be erosion for hundreds of thousands of years that this mountain is gradually eroding away. As that is eroded away, you find that the mountain top will be lower. The gold in the quartz will be released. This comes through frost action, through chemical action, organic acids, and so forth. You will find, then, that the particles will tend to work their way down the hill and, as they work their way down the hill, gold is released, further released. You will find eventually these particles will arrive down at the bottom of the

(Testimony of Earl H. Beistline.)

valley, where they will come under the influence of a stream flowing.

Now here you have one type of a deposit. That is known as a residual placer deposit. This type of deposit usually isn't a rich deposit because you have not had good concentration to this point. However, as soon as the material gets down into the valley form, a lot of this country rock, which is clay, is washed away, leaving only the particles of gold and the more resistant rock, such as quartz, boulders, granite boulders, and so forth, that would be here (indicating).

Then you would have a placer deposit that would be formed in a manner like so (indicating), again, now looking from an airplane, and a creek coming down, here would be your mountain coming into here (indicating), and then you would have your gold, say, in through like this, a matter like so (indicating). [247] We might remark that the present location of the gold may not necessarily have any bearing to the stream. In this particular part of the country, that is, the Fairbanks area, we have had just this happen. In addition, we have had another factor that has come in. After the gold has been put into the valley and gravel worked in with it, we have had the entire deposit covered with an overburden. This overburden is locally called muck, and it is derived from the wind blown, it is brought in by the wind from the deltas of the Alaska Range, and it has a depth of from somewhere from one foot maybe up to two



(Testimony of Earl H. Beistline.)

hundred feet. So now, then, the type of deposit that we mostly have in Fairbanks in placers would look something like this. This would be, now, another view, another elevation.

Q. Would you care to use this?

A. All right. Here on the surface we have our moss and our tundra. Below we have our muck. That muck again has a depth of anywhere from, say, zero feet up to maybe 250 feet. It is all wind blown for the most part, occasionally worked over by water. It contains no gold whatsoever. The only thing of any value found in the muck is remains of the Pleistocene animals, the mastodon, the mammoth, the saber-tooth tiger, and so forth. And then below the muck we have our gold-bearing gravels, and the gold-bearing gravels can vary in depth from zero, maybe, up to 250 feet, depending on where you are. Gold has been concentrated in the gravel. Sometimes it is evenly distributed throughout in [248] a vertical section. More often than not you do not have that type of distribution. You have a very irregular distribution, with quite a bit of the gold being concentrated at bedrock. This, then, would be your bedrock, solid rock (indicating).

The bedrock doesn't turn into solid rock, such as you would have at the top of a table here. Rather, it is decomposed for maybe two or three feet, and as a result, a dredge coming by or a placer operator will dig several feet of bedrock, as well as the upper portions of the gravel.

(Testimony of Earl H. Beistline.)

That, essentially, gives an idea of the type of deposit that we do have here. I might explain once again that when the gold is put down, that is quite irregular. We never know where it is going to be. It can be concentrated here (indicating). It could be spread throughout the gravel. It could be concentrated up and down the stream in pockets, or pot-holes or sections of bedrock that are swept absolutely clean, and other sections where it is quite heavy.

If you care, I can now explain drift mining.

Q. If you please, would you now explain the various methods of placer operations or mining of gold, with emphasis on drift mining generally?

A. If I may put it this way; that you have a number of different types of placer operations. One of the very common types in this area is dredging, and for dredging the overburden is removed by water under pressure. The gravels, which are [249] thawed, have to be thawed, and after they are thawed a dredge comes in to excavate all of the gravel and carry it away. The same thing is done by a small-scale method, quite often known as your mechanical methods, or hydraulic methods, where you use a bulldozer to push the overburden away, to push the gravel into recovery plants which are known as sluice boxes.

Another method now used to a very large extent in the past has been drift mining, and that, of course, is probably the most important part of this discussion now, and drift mining is used to

(Testimony of Earl H. Beistline.)

mine small areas, or areas where it will not pay to remove the overburden and a great depth of gravel. The method used to develop a drift mine will be first to sink a shaft, come to the surface, sink a shaft on down to bedrock. After a shaft has been sunk to bedrock, then drifts are driven. A drift is an underground opening, usually horizontal. Drifts will be driven upstream usually, downstream. It doesn't have to be upstream or downstream. It could be across the stream. And then mining will begin at a point here (indicating).

One of the peculiar characteristics of drift mining is that you will only mine a relatively narrow depth, perhaps six feet. That six feet will be made up, maybe, of four feet of gravel and two feet of bedrock.

The reason for this is that you are taking out the area where the gold has been put down next to bedrock. The gold that is scattered up through the gravel here is never recovered by [250] drift mining for the most part. Now, this again is a vertical section. If you were to look at this same thing from an airplane looking down, you would have your shaft here (indicating), you would go down the shaft a depth anywhere from 25 feet to maybe several hundred feet, and you would drive your drifts out, as indicated here (indicating), and at the end of the drifts you would put in your cross cuts like so (indicating), and then you would start thawing the gravel and hoisting it to the surface out the shaft. That material, then, comes

(Testimony of Earl H. Beistline.)

out of the shaft, and it is washed usually in a sluice box.

Q. Mr. Beistline, if you had been driving down a drift in drift-mining operations and had encountered what you thought was rich pay, what is the probability that you would continue to find the same amount of probable rich pay as you continued the drift?

A. Due to the irregular deposition that takes place in a placer deposit, it wouldn't be indicative one way or another. In other words, you have irregular spots. You may have a good spot here (indicating) and out here none. It could be the other way.

Q. One foot beyond what you mined or sampled or tested in the mine there may be nothing?

Mr. Taylor: Just a moment. Your Honor, I am going to object to the question and ask that it be stricken, as entirely leading and suggestive of the answer. [251]

Mr. Cole: Very well, I will restate the question.

Mr. Taylor: I think since Mr. Beistline is on the stand he is the one that should do the testifying.

The Court: Very well. Sustained. And are you through with the chart? Do you wish to go back on your chair over here, Mr. Beistline?

Mr. Cole: At this time I will move that this be marked for identification and move that it be admitted into evidence.

(Testimony of Earl H. Beistline.)

Mr. Taylor: We object, your Honor, on the grounds that we already have a sketch in evidence here of perhaps a better illustration than Mr. Beistline's.

Clerk of Court: Defendant's Identification C.

(The chart was marked Defendant's Identification C.)

The Court: Very well. Identification C will be received. We are certainly not taking the other exhibit out, Mr. Taylor.

Mr. Taylor: This is an exhibit, your Honor.

The Court: That exhibit is not being removed.

Mr. Taylor: Oh, no, no.

Clerk of Court: This is Exhibit No. 2.

(The chart previously marked Defendant's Identification C was received in evidence and marked Defendant's Exhibit No. 2.)

The Court: Is the other one received?

Clerk of Court: No, it has not, your Honor.

Mr. Cole: I ask that it be marked for identification and [252] move that it be admitted into evidence.

Mr. Taylor: We object, your Honor, as purporting to serve the same purpose. That has already been introduced in evidence. It would only be cumulative and corroborative.

Clerk of Court: Defendant's Identification D.

The Court: D will be received.

Clerk of Court: Exhibit No. 3.

(Testimony of Earl H. Beistline.)

(Chart drawn by witness Beistline, marked Defendant's Identification D, was received in evidence as Defendant's Exhibit No. 3.)

Q. (By Mr. Cole): Mr. Beistline, if while drifting in a placer drift mine, good or so-called good pay had been obtained, is it logical to assume that these same values would continue in the drift if it were extended?

A. No, it would not.

Q. Why?

A. Because of the irregularity of a placer deposit.

Q. Would you amplify that, please? Can you amplify that answer?

A. Yes. By the very nature in which your deposit is put down, there are so many factors that enter into the gold being caught in bedrock. The gold does not come out as a uniform ribbon or a layer in the deposit but rather it depends on the type of bedrock you have, the velocity of the waters, and many [253] other things of that nature. So here you may have a pocket of gold, five feet away you may not, and it could be that way throughout the deposit. There are many spotty deposits known in the Fairbanks area.

Q. Is there any way, Mr. Beistline, to determine or to estimate the gold-bearing content of the particular claim or area of ground for placer operations?

A. Yes, there is, Mr. Cole.

(Testimony of Earl H. Beistline.)

Mr. Taylor: Just a moment. I didn't quite get that question.

The Court: I will have it read.

(Thereupon the reporter read the last question.)

Mr. Cole: And the answer?

(Thereupon the reporter read the last answer.)

Q. (By Mr. Cole): What is that method, Mr. Beistline?

A. That is a method of prospecting known as churn drilling.

Q. And what is churn drilling?

A. Churn drilling consists of taking a sample by making a hole varying in diameter from three inches up to six inches, other extremes also. Material from the hole is brought out, the gold is recovered, the volume of the hole is measured, and from that particular point you can then establish a unit value. Additional holes then are put down throughout the deposit. Each [254] hole is given a unit value; after the hole is drilled it can be combined, and from that combination one can determine if a profit can be made in mining that particular area.

Q. Is there any way to determine the gold-bearing content of a claim without drilling and sampling, as you have outlined?

A. There is no way of determining the gold content in a claim other than by prospect sampling.

(Testimony of Earl H. Beistline.)

Q. Are you acquainted with the manner in which the area surrounding a placer drift mining operation would be sampled? A. Yes, sir.

Q. How many holes would you have to drill in the immediate area of a drift and lying beyond to determine with any degree of accuracy the amount of gold-bearing ore or the gold-bearing content of that gravel?

A. The number of holes would be determined by the general characteristics of the deposit. You will find that in prospecting a creek you may need as many as 200 holes. The holes can be spaced at fairly large intervals. In other cases you will find that holes will be spaced at very small intervals.

Q. I call your attention to Plaintiffs' Exhibit V. Will you please observe it, and you may step down from the witness stand.

Can you interpret it, and is it legible to you?

A. Yes, sir. This is evidently the shaft (indicating) in which mining was started and by the legend the drifts came [255] down here and turned and followed to a point there (indicating).

Q. Now, if there had been a drift that extended along the line which my finger has indicated and a face opened in this area of approximately 60 feet wide by 30 by 6, how many drill holes would it be necessary to drill, in order to determine the areas surrounding this drift which could be mined, would it be necessary to drill to accurately sample the ground?

A. If I might just explain for a minute the



(Testimony of Earl H. Beistline.)

theory behind sampling, I think perhaps it will help to answer your question.

Q. You may.

A. We can give two extremes of the sampling procedure. The very best sample is the entire deposit. We know that is not practical, because after we have that sample we have no deposit and can't mine.

On the other hand, the very poorest sample that we can get will be the smallest portion that we could take from a deposit.

The practical method would be to take a number of samples that would give us a good, representative value for the deposit.

Now, on a large creek that, say, is five or six miles long and perhaps seven or nine feet wide, you would arrange a prospecting program that would allow samples to be taken maybe every thousand feet in a line across the pay streak, that is, across the valley, every thousand feet, you will drill a line of holes. The spacing of the holes across the valley in the line could probably be 150 to 200 feet apart. By the time you finish the [256] entire creek you would have two, three or four hundred holes.

In other cases where you know that you have a spotty deposit, instead of having your lines a thousand feet apart, you would have your lines 500 feet, 200 feet, maybe a hundred feet apart, and you would have the spacing between the holes, instead of being two hundred feet, maybe 100 feet,

(Testimony of Earl H. Beistline.)

maybe 50 feet, maybe 25 feet. You would have to design your prospecting program to the creek you have. It is true we are trying to find out information but there is a balance, the egg and the chicken, along the way.

So to block out ground in this particular case, it would seem to me that you would have to have at least a face here plus several drill lines covering the entire extent that you want, and I would say there that you would probably want close spacing of maybe 25 feet across the pay streak.

Does that answer your question?

Q. That is fine. Thank you, Mr. Beistline. That is all. A. It is a little difficult to——

Q. Now, is it possible to estimate the pay of that area without taking those samples as you have indicated, with any degree of accuracy?

A. It would be impossible to get the amount of pay without taking samples.

#### Cross Examination

Q. (By Mr. Taylor): Now, Mr. Beistline, just hold your position there a [257] moment.

A. Yes, sir.

Q. Now, Mr. Beistline, you have qualified yourself as an expert in placer mining. First I will ask you: I suppose you have talked this matter over with Mr. Cole, have you?

A. Yes, up to a certain point, Mr. Taylor.

Q. Are you connected now with any mining operations in the Fourth Division——

(Testimony of Earl H. Beistline.)

A. Yes, sir, I am.

Q. —and that is the McClaren River?

A. No, I am not connected with McClaren River, as such.

Q. That has gone defunct, has it not?

A. No, sir, the company is operating now, I understand, carrying on a mining program, mining, drilling, and also driving drifts.

Q. You are not connected with it any more?

A. Other than being a minor stockholder.

Q. What compensation are you receiving for testifying in this case, Mr. Beistline?

A. None, sir.

Q. No compensation?                      A. No, sir.

Q. Were you subpoenaed to come here?

A. No, sir. [258]

Q. You just out of the goodness of your heart came in and testified?

A. I was asked to come in as an expert witness.

Q. Isn't it a fact in some creeks, Mr. Beistline, you will find the gold for eight or ten or twelve claims, maybe over a distance of several miles it will be pretty evenly distributed, especially where the creek bottom is fairly narrow?

A. You have that possibility, yes, sir.

Q. Have you ever been on the Gold King Placer Mine over near Grub Stake?

A. No, sir. I have spent a year in that area, on Caribou Creek, and I don't recall the name of the claims.

Q. Just, for instance, assuming that across here

(Testimony of Earl H. Beistline.)

(indicating) and across here (indicating) there is a line of drill holes, some of them 25 feet apart and across this way a line of holes 50 or 100 feet apart, and that in this area here those drill holes showed \$2.18 on bedrock and the next one would show \$3.14 and vary along those lines over a considerable distance there, and that valuation was based upon \$20.67 per ounce, would you state whether or not that would be good drift?

Mr. Cole: I object to that question, your Honor, on the ground that it is stating hypothetical facts, none of which are in the record.

The Court: Sustained.

Mr. Taylor: That is a hypothetical question, your Honor. [259] I think I can——

The Court: There is nothing in the evidence, however, to bear it out.

Q. (By Mr. Taylor): Well, now, say for instance, Mr. Beistline, this is in evidence, Mr. Beistline, say that this drift was run in here (indicating), this shaft is here, they made a turn here (indicating), this is an abandoned drift, and this is an abandoned drift, they came down here and then they went over here and then they came back and up here (indicating) and came on over. When they got approximately to there (indicating) that they ran into some high dirt, that is, the pans showed there from fifty cents to \$1.50 a pan, taken from a height of six feet and scraped off of the frozen muck or frozen muck and gravel down to bedrock, and it averaged from fifty to \$1.50 a pan, and by

(Testimony of Earl H. Beistline.)

reason of that showing they then drifted 30 feet along the pay streak or what we call the rich zone and 30 feet the other way, and that intense panning the full face of there showed the same values and that the points were put in as they excavated and took out that gold-carrying strata six feet high, 12 feet deep and 62 feet long, and then after that was removed the values showed even better when they were driving the points in for the next thaw, would you say that would be a minable drift proposition?

A. Before answering that question, may I——

Q. Just answer yes or no. [260]

Mr. Cole: If you can't answer the question, just say so.

Q. (By Mr. Taylor): Now, another thing, we have a hoist here (indicating), a steam hoist, and we had a shaft, and we also have rails and mine cars down to the place.

A. I have one question that, I would very much like to answer but one thing bothers me.

The Court: Are you able to answer the question?

The Witness: If the units are cleared up for me; in other words, the units that have been given here to me are a dollar and a half, or some such figure as that. Now, is that a dollar and a half per cubic yard?

The Court: He wants to know the quantity.

Mr. Taylor: No, that is fifty cents to a dollar and a half per pan, which would be equivalent, 50 cents a pan, to about \$3.50 per yard or \$3.50 per cubic foot or \$94.50 per cubic yard.

(Testimony of Earl H. Beistline.)

A. Using your figures of \$3.50 a cubic yard—a foot.

Q. (By Mr. Taylor): Cubic foot. You are taking out six foot high.

The Court: Mr. Taylor, I think it would simplify matters if you would stay with the testimony instead of going into cubic yards or cubic feet, I think it was per shovel or per pan.

Mr. Taylor: Yes, but, your Honor, we reduced that down to seven pans to a cubic foot.

The Court: You have done that, I believe. I haven't checked [261] that. There is nothing in the evidence about that.

Mr. Taylor: Mr. Kupoff testified to that, your Honor, that it was fifty cents to a dollar and fifty cents a shovelful or pan.

The Court: That is right.

Mr. Taylor: Yes, per pan.

Mr. Cole: Your Honor, I will agree that the witness said there were 27 pans or shovelfuls per square foot and performed some——

Mr. Taylor: No, not square foot, your Honor, because that would be cubic foot, and not 27—7 shovelfuls per cubic foot.

The Court: Very well.

A. You still are not dealing in the units that quite often would be used to evaluate placer deposits. In other words, when we evaluate a placer deposit we use two common methods. We use a value based on cents per square foot, which is a common method used when drift mining was done.

(Testimony of Earl H. Beistline.)

At the present time, now, at the present time most of the large companies would use the unit cents per cubic yard. It is a much easier figure, and you have a certain quantity, you have so many cents per cubic yard.

Now, cents per square foot, that figure is useless unless you have the depth. If you put in, say, that you have a vertical height of six feet and if that represents one square foot of area and if that runs, say, fifty cents, then we can convert to cents per cubic yard. In other words, it would be 27 [262] cubic feet per cubic yard, divided by six, which would be a little more than four, four and a half times fifty cents would give you \$2.25.

Q. (By Mr. Taylor): Per what?

A. Per cubic yard.

Q. No, you are wrong, because we are taking it on the cubic measurement as the sample is taken from six feet up and it is scraped off all the way down, so that there would be, you might say, a cross sampling of that, so then you pan it, and that would run fifty to a dollar and a half for every pan. Of course, they could go down to bedrock and just one pan from there they have \$3.50 a pan.

Mr. Cole: There is no such evidence as that in the record.

Mr. Taylor: It is in the old record.

Mr. Cole: I wasn't aware that we were using the old record.

The Witness: I will answer your question very

(Testimony of Earl H. Beistline.)

specifically if you will convert your figure to dollars per yard, which I think you did.

Q. (By Mr. Taylor): \$94.50 per yard, what would that——

A. If that ground ran \$94.50 per yard, the area represented by that sample would be very minable.

Q. Yes, sir, and if the entire frontage of that 60 feet there after the 12 foot was taken out and it even showed better values than that as they went into the pay streak but didn't [263] get across the pay streak and at where the frozen ground is still up here where they haven't opened up the face and the values were holding up the same up at each end as they were in the center——

Mr. Cole: I object to that question. It contains many matters which aren't in evidence.

Mr. Taylor: Mr. Kupoff testified to that and Mr. Zukoev also.

The Court: He may answer and the jury is cautioned to recall the evidence.

A. To evaluate a block of ground, the samples that you have here would be given a certain distance of influence and it could come out like so (indicating); how far you would go in either direction is usually dependent on additional prospecting that would be done out on either extreme, and what we can say is that the ground had the samples, had the values to indicate that that area that actually they came from could be minable.

Q. (By Mr. Taylor): What?



(Testimony of Earl H. Beistline.)

A. Probably under the figures that you gave of some \$94 a cubic yard.

Q. Now, Mr. Beistline, I call your attention to Plaintiffs' Exhibit W. Is that a fair representation of underground workings of a mine?

Mr. Cole: I object to that question, your Honor. It doesn't [264] make any difference. How does this witness know it is a fair representation of an underground mine?

Mr. Taylor: He described underground mining. I am asking him for the purpose of the jury if that is a good representation of underground mining.

The Court: I will permit him to answer, if he can.

A. Yes, that shows to me what is taking place. You have the surface of the ground shown here. You have a vertical shaft, the opening driven this way, a parallel opening down this way and then the face.

Q. (By Mr. Taylor): Your track and mine cars and all; is that right?      A. Yes, sir.

The Court: Mr. Taylor, may the witness come back to the chair?

Mr. Taylor: Yes. Pardon me, your Honor.

(Thereupon the witness resumed the witness chair.)

Q. (By Mr. Taylor): Now, Mr. Beistline, I hand you——

Mr. Cole: I am going to object to any further conversation with regard to this because this piece

(Testimony of Earl H. Beistline.)

of paper has been offered in evidence many, many times and has been excluded from evidence.

The Court: It is true, it is not in evidence. I don't know whether counsel can get it into evidence through this witness or not, but I will let him put his question. [265]

Q. (By Mr. Taylor): Mr. Beistline, I have here Plaintiffs' Identification No. 19, and I can explain some of the matters here. The dark dots are drill holes.

Mr. Cole: Your Honor, I hate to continually object, but I think——

The Court: I didn't know what counsel was going to ask the witness.

Mr. Cole: He knows better than that.

Mr. Taylor: You don't.

Mr. Cole: Well, if you don't, it is about time you learn.

Mr. Taylor: The old miner back there.

The Court: Of course, the identification is not in evidence. I thought maybe you were trying to lay the foundation by this witness to get it into evidence. There would be no other object in questioning him.

Mr. Taylor: That is right, your Honor. He is an expert on this. I was just going to ask him a question, showing him the drill holes and just wanted to know if it would be possible to get some idea from those drill holes, if we had the result of them, as to whether it would be a test.

The Court: I will not permit that question.

Mr. Taylor: That is all. [266]

(Testimony of Earl H. Beistline.)

Redirect Examination

Q. (By Mr. Cole): Mr. Beistline, when you say the area around there would be minable, it is pretty much a guess whether they would be able to make any profit mining the area or how much it would be?

Mr. Taylor: Just a moment. Your Honor, we object to the leading question and the conclusion of the attorney. He should know better than do that.

The Court: I am going to sustain it as leading.

Q. (By Mr. Cole): Would it be possible to determine, Mr. Beistline, without knowing the expenses which were being incurred by the operation to determine whether the area would be profitably minable?

A. You would have to know the expenses to calculate the amount of profit. That very definitely is true in any operation, you have income and expense. The difference between the two would be the profit. The income is determined by sampling the deposit to determine the amount of money. The expense quite often can be calculated in detail, taking the wages of the men concerned, the expense of mining, purchase of equipment, and so forth.

Q. Is it possible to determine, without samples being taken of the surrounding area, how much of the area would be profitably minable? [267]

A. Without samples, no. The samples will give you one phase of the little formula, income.

Q. What was the average cost of moving a cubic yard of gravel in a mine such as that in 1940?

(Testimony of Earl H. Beistline.)

Mr. Taylor: Just a moment, Your Honor, I don't think that the witness was—that a proper foundation has been laid for such evidence as that.

The Court: Yes.

Mr. Taylor: I think that counsel is going into something that was touched upon in direct examination.

Mr. Cole: May I make a statement? Mr. Taylor asked whether it would be minable, and profitably minable, and that is the reason I am trying to reopen the door for that question.

The Court: There is some point in that, but I think you asked in 1940.

Q. (By Mr. Cole): In 1942, how much was the estimated cost of moving a cubic yard of gravel in a placer drift mine such as outlined on the exhibits which you have been shown?

Mr. Taylor: Just a moment. I don't think he has taken all the facts into consideration, the wages, the cost of boarding the men, and so forth.

The Court: The witness may answer if he is capable or able.

A. Mr. Cole, I can give you some minimum and maximum costs [268] for drift mining that are published in Field's Handbook, Mining Engineers' Handbook.

Q. (By Mr. Cole): Please do.

A. Drift mining on Fairbanks Creek in this area had a minimum cost of about \$2.44 per cubic yard, a maximum cost of around \$7.85, and the average for 17 claims was \$5.40 per cubic yard.

(Testimony of Earl H. Beistline.)

That was published in Peele's, the Engineers' Mining Handbook, and I am quite sure of my figures, but I am not sure of the date.

Mr. Cole: That is all, thank you.

### Recross Examination

Q. (By Mr. Taylor): So, then, Mr. Beistline, for gravel that had \$94.50 worth of gold, that would be a very profitable operation, would it not?

A. By the figures that I have given, I would assume yes.

Q. Let's go back to 1942, when the miners were paid 95 cents an hour, they reported for \$1.50 a day, wouldn't that make the cost of removing each yard of gravel considerably less than that?

A. No, sir. I believe the figures were probably a little earlier than 1942.

Q. So it would be about the same then?

A. Or, in fact, I think it would go the other way. I think costs have increased, wages have increased and so forth, even [269] back.

Q. Since then? A. Yes.

Q. If the wages went from 72 to 95 cents an hour they would still make a very good profit on \$94 a yard dirt, would they not?

A. \$94 a yard dirt is very fine dirt, if you can find it.

Mr. Taylor: That is all.

### Redirect Examination

Q. (By Mr. Cole): Mr. Beistline, have you ever

(Testimony of Earl H. Beistline.)

found any, that you know of in appreciable quantities, \$95 a yard dirt in the Fairbanks area?

A. I am not aware of such at the present time.

Mr. Cole: That is all.

(Witness excused.)

Mr. Cole: Now perhaps we could take the recess.

The Court: Is that satisfactory?

Mr. Taylor: That is satisfactory.

The Court: Members of the jury, please heed the admonition I have previously given to you, and we will recess for ten minutes.

Clerk of Court: Court is at recess for ten minutes.

(Thereupon a ten-minute recess was taken.)

Clerk of Court: Court is reconvened.

(The jury was excluded from the courtroom.)

The Court: Are the parties ready to proceed?

Mr. Cole: The defendant is ready, your Honor.

Mr. Taylor: The plaintiff is ready, your Honor.

The Court: Very well. The jury will be kept out for a few minutes. At this time I will consider more fully Mr. Cole's offer in connection with reading of a portion of the testimony of the former trial. What do you have in mind, Mr. Cole?

Mr. Cole: I wish to commence reading, your Honor, at the bottom of page 53 of the official transcript beginning with the question, "They were still working. Now, going back a ways, Mr. Kupoff, when you were working, driving that drift, did you take out any gravel?" and he states that he had taken out gravel and they had left it, they never

washed any, and most of it was still out there, and then again on page 56, at the bottom, the witness was asked whether they cleaned up the dump and he doesn't know whether anyone washed it up, and the same testimony appears on page 58 and page 59.

The Court: For what purpose are you offering it?

Mr. Cole: I am offering this testimony in evidence for the purpose of establishing a connection between a dump which is on the property at this time——

Mr. Taylor: We object to that, your Honor.

Mr. Cole: ——and the dump which—to show that the dump which [271] is now on the property is the same dump which the plaintiffs left, and by their own testimony establish a rational connection as a foundation for further testimony.

Mr. Taylor: If the Court please, Mr. Kupoff said he didn't recognize that dump at all when he was given a defendant's identification the other day. I don't think that there was enough information brought out from Mr. Kupoff to say whether his testimony was in relation to this dump, a small dump which appeared in this picture. I don't see where there is any relation to it, your Honor. He didn't say that was the dump that they left out there.

The Court: Perhaps my ruling is erroneous, but I understand the defendant is attempting to offer a portion of the testimony of the witness in the former trial for substantive evidence in the defendant's case, and I will reject and deny the offer.

Are we ready for the jury now?

Mr. Taylor: The plaintiffs are ready, your Honor.

Mr. Cole: The defendant would like a ten-minute recess, your Honor. I would like to have permission to submit authorities to the Court on that proposition, because I have authorities for it.

The Court: If you can submit them right now, I will consider them.

Mr. Cole: I would like a ten-minute recess, your Honor.

The Court: The trouble is after a ten-minute recess, then [272] after you submit them, I will want to look at them.

Mr. Cole: May I have just a moment?

I think for the record at this time I had better state quite clearly my position.

The Court: Very well.

Mr. Cole: It hasn't been done before.

It is the defendant's contention that the admissions exception to the hearsay rule permits the introduction of any statements which are relevant to the issue to be introduced, and that since these statements may be introduced through the testimony of any person who heard them, such as any person who was in the courtroom and heard the statements being made, therefore these same statements may be introduced in evidence through the introduction of the official transcript, which in theory of the law is much more reliable than the testimony of any witness who heard the statements being made.



That is the position of the defendant.

At this time I don't have case citations, but at this time I again request permission to introduce into the record portions of the testimony of Mr. Kupoff in the prior action through the admission of the official transcript in the prior case.

The Court: Perhaps it is a matter that I should be well versed in, but it is a matter of first impression to me and counsel having no authorities, I will deny the offer, and shall we have the jury brought in? [273]

Mr. Taylor: If the Court please, I was just going to state, if this comes up again, the Federal Rules of Civil Procedure provide that a deposition taken in a previous case can only be used if the witness is out of the jurisdiction of the Court.

The Court: This isn't a deposition.

Mr. Taylor: The evidence used in a former trial. I looked it up after the Court ruled in regard to my motion to allow the reading of the testimony of Joseph Ullmer in the previous trial, and I found out the Court was right in its ruling. I don't think it would be proper to allow him to just pick and choose a few lines here and there.

The Court: The jury may be brought back.

(Thereupon the jury was brought into the courtroom and resumed their places in the jury box.)

Mr. Cole: I call Douglas Colp.

**DOUGLAS COLP**

a witness called on behalf of the defendant, after being duly sworn, testified as follows:

**Direct Examination**

Mr. Cole: Your Honor, may I recall Mr. Kupoff for cross examination under the Federal Rules of Civil Procedure.

Mr. Taylor: We object, your Honor, He has already been cross examined.

The Court: He may be called. [274]

Mr. Taylor: He can make him his own witness.

The Court: The objection is overruled. You may step down, then. Counsel has changed his plan. You will please wait, Mr. Colp.

(Witness temporarily excused.)

**NICK KUPOFF**

one of the plaintiffs, having been previously sworn, was called on behalf of the defendant, and testified as follows:

**Direct Examination**

Q. (By Mr. Cole): Mr. Kupoff, on or about the 28th day of December, 1948, in this courtroom, in the trial of the action entitled Nick Kupoff, James Zukoev, Mike Kitoff, Nick Kabak, a partnership, doing business under the firm name and style of North Star Mining Company versus Vuka Radovich Stepovich, did you not testify in response to the following question, as follows:

“Q. They were still working. Now, going back a ways, Mr. Kupoff, when you were working, driving that drift, did you take out any gravel?”

(Testimony of Nick Kupoff.)

And did you not answer: "Yes, we have."

A. I don't remember what I answered ten years ago.

Q. And to the question: "And what did you do with that?" did you not reply, "Well, we left it out there. We washed some and left a big pile out there. Never had a chance to clean anything." [275]

Mr. Taylor: Just a moment, your Honor. I think that I am going to object to the question, upon the ground that there is no stating as to what the subject matter is that he is talking about. I think he should go back further and take more of the record so that the jury and the witness will know what the subject matter of the conversation was.

The Court: Of course, if the witness doesn't know what the question is, he may say so.

You may proceed.

Q. (By Mr. Cole): Did you not give that answer?

A. Well, I can't give it to you, because I don't remember. You have got it in the books and I haven't. I don't remember what I say.

Q. And then to the following question did you not give the following answer:

"Q. What did you do with the gravel you took out of the drift?

"A. We pile it there at the head of the boxes."

A. That is the same thing, I don't remember what I answered before.

Q. Did you not give the following answer to the following question:

(Testimony of Nick Kupoff.)

“And then, afterwards, what did you do with that gravel? [276]

“A. It is still out there, as far as I know.”

Did you say that?

A. That could be, but I don't remember what I answered, to tell the truth.

Q. Did you not give the following answer to the following question:

“Q. Did you ever wash it?

“A. We wash some, but most of it is out there”?

A. Well, that is the same thing, I might say that.

Q. Is that true?

A. No, I can't give you the truth on that. I don't remember what I answered ten years ago.

Q. When you left, did you leave a dump out there?

A. Maybe that is out of this book—yes, we left a dump out there.

Q. And did you not give the following answer to the following question:

“Q. Did you and your partners clean up the dump? Did you wash the dump that you had out there?

“A. Well, not after that clean-up.”

Is that right?

A. Well, what dump we had after we closed out, we never touched it.

Q. So as far as you know the dump is still out there?

(Testimony of Nick Kupoff.)

A. Well, it could be. I never been out there since. [277]

Mr. Cole: That is all.

Mr. Taylor: That is all.

The Court: That is all, Mr. Kupoff.

(Witness excused.)

Mr. Cole: I now call Douglas Colp.

### DOUGLAS V. COLP

called as a witness on behalf of the defendant, having previously been sworn, testified as follows:

#### Direct Examination

Q. (By Mr. Cole): What is your name, sir?

A. Douglas V. Colp.

Q. What is your occupation, Mr. Colp?

A. Consulting mining engineer.

Q. How long have you been a consulting engineer?

A. Less than two years.

Q. What formal training have you had as a mining engineer or mining operations?

A. I graduated from the University of Alaska in the spring of 1940 with a degree of Bachelor of Science in Mining Engineering.

Q. What experience have you had in mining operations prior to and subsequent to your graduation from the University of Alaska?

A. I have worked around placer mining and mining in the interior of Alaska since 1936, during my college work and after. [278] During my college work I worked for the American Creek Operating

(Testimony of Douglas Colp.)

Company in the Manley Hot Springs district for three years. I worked for the F. E. Company prior to that, and then I worked in the Caribou country in the Upper Salcha for one year on that dredging, built that dredge at that locality, and then after the war I was up in the Koyukuk, spent one season in the Koyukuk country below Wisman, and then was superintendent for five years for Kobuk Drainage, and I was superintendent for Callahan Zink Lead Company at Livengood for three years, and then I went working for the, became associated with the coal-mining industry at Healy and the Matanuska Valley after my work with the Callahan Zink Lead Company at Livengood. Almost two years ago I became associated with the Philleo Engineering Service here in Fairbanks, after having received my registration number from the Territory of Alaska to practice mining engineering therein.

Q. Have you had any experience with placer mining evaluation?      A. Yes, sir.

Q. What has been that experience?

A. During work in the placer mining field, the first prerequisite is always to know what is in the ground and, consequently, I have worked on drilling rigs, I have panned behind drilling rigs, and have helped evaluate the ground in several localities.

Q. I will hand you Defendant's Exhibit 1, Mr. Colp, and ask you to please observe it. [279]

(Witness perused the exhibit.)

Q. Have you observed it?      A. Yes, sir.

Q. Do you recognize it?      A. Yes, sir.

(Testimony of Douglas Colp.)

Q. Have you had occasion to recently view the premises which are portrayed in this exhibit?

A. Yes, sir.

Q. Would you state the occasion, please?

A. On, I believe it was, October the second, this past October the second, I was asked by the counsel for the defendant in this case to evaluate the dump on what I will call the Stepovich claim on Fish Creek, and on the third of October I visited the claim and began my evaluation of the dump. That is visible in the picture there.

Q. When you first began your evaluation, what did you do, Mr. Colp?

A. To begin a valuation such as this without a drill, the first step is to dig holes at intervals over the pile, and in this particular instance I dug 15 holes. From those 15 holes I took 30 pans of material. I dug these holes approximately one foot deep. I shouldn't say one foot deep. I should say one foot in volume. I took about one cubic foot of material out of the hole. Some of the holes were a foot deep, some of them were more than that. The deepest one was  $2\frac{1}{2}$  feet deep, but from [280] these holes, from each of these holes, I took two pans of material and bailed water out of a shaft that I found near this dump into a barrel and I panned the material, panned out these 30 pans of ground.

The panning, I imagine you are all familiar with, is the process we call the extraction of the gold from the gravel. That is, to put the material into a gold pan, you rotate and oscillate and gyrate this

(Testimony of Douglas Colp.)

pan of material under water. The gold, being approximately nine times heavier than gravel or sand, sinks to the bottom and the sand floats or is worked over the edge of the pan. By a process of eliminating the lighter material and the concentration of the heavier material, it results in the gold being deposited on the bottom of the pan, with all the material, waste material, off, and these particles of gold were placed in vials.

In most cases I put four pans in one vial. In one case I put eight and in another case I put six, and I noted on the vial approximately how much each pan contained. I estimated that and upon completion of the sampling I brought the samples into a milligram balance scales and weighed the samples and so noted the actual weight of the sample on the vials.

Q. Mr. Colp, from your experience as a mining engineer and in connection with your appointment in evaluation of placer mining have you done much panning? A. Oh, yes, sir. [281]

Q. Do you have any idea how many pans of gravel that you have panned?

A. That is a rough question. Thousands. I don't know.

Clerk of Court: Defendant's Identification E.

(Picture of purported dump at Fish Creek was marked Defendant's Identification E.)

Q. (By Mr. Cope): Mr. Colp, I hand you Defendant's Identification E and ask you to please observe it. A. Yes.



(Testimony of Douglas Colp.)

Q. Have you observed it? A. Yes, sir.

Q. Can you identify it? A. Yes, sir.

Q. What is it?

A. This is the same dump as shown in the other photograph. One——

Q. Let me ask you a question, or perhaps you had better continue.

A. These are two views of the same dump. One view is taken from the top of the intake flume looking in a northerly direction, showing the top of the dump, and it also shows the position of five different excavations I made for sampling purposes.

This other picture is a side view of the dump and it shows [282] six holes that were made for sampling purposes.

Q. Do those photographs truly and accurately portray the scene? A. Yes, sir.

Mr. Cole: The defendant moves admission into evidence of Defendant's Identification E.

Mr. Taylor: To which the plaintiffs object, your Honor, on the ground that a proper foundation has not been laid.

The Court: It will be received.

Clerk of Court: Defendant's Exhibit No. 4.

(Picture purported to be two views of dump at Fish Creek, previously marked Defendant's Identification E, received in evidence and marked Defendant's Exhibit No. 4.)

Mr. Taylor: I would also like to make a motion, your Honor, that it be—object to it upon——

Mr. Cole: It has been received.

(Testimony of Douglas Colp.)

Mr. Taylor: Just a moment, Mr. Cole, please. I am making a motion to the Court.

Mr. Cole: It has been received into evidence, Mr. Taylor.

Mr. Taylor: I am asking that it be excluded upon the grounds that it is incompetent, irrelevant and immaterial to prove any of the issues now before the Court, as there is no evidence to show where that dump is, where the rock or whatever it is there came from and it looks like snow to me, and whether it has ever been mined by the defendant. There is absolutely no showing, your [283] Honor, that would allow it in. It would be highly prejudicial.

The Court: The objection is overruled.

Clerk of Court: Defendant's Identification F, G, H, I, J and K, being six bottles.

(The six vials produced by the witness Colp were marked Defendant's Identifications F, G, H, I, J, and K, respectively.)

Q. (By Mr. Cole): Mr. Colp, I hand you Defendant's Identification F and ask you to observe it, please.

(The witness perused the exhibit.)

Q. Have you observed it? A. Yes, sir.

Q. Can you identify it? A. Yes, sir.

Q. What is it?

A. It is a vial containing 52 milligrams of gold panned from four pans on October—that I panned from four pans of dirt on October 3rd.

Q. Where did those pans of dirt come from?

(Testimony of Douglas Colp.)

A. They came from the dump as shown in the exhibit that I just looked at.

Q. Can you state where or from what part of that dump those pans were taken?

A. This was taken from the top of the dump, near the top of the dump. [284]

Q. I hand you Defendant's Identification G and ask you if you can identify it.

A. Yes, sir.

Q. What is it?

A. That is a vial also containing gold. This amount of gold represents 39 milligrams and it is taken from near the top, probably a little bit further from the top of the dump.

Q. The same dump to which you have made reference?

A. That is right.

Q. I hand you Defendant's Identification H and ask you if you can identify it after observing it.

(Witness scrutinized the proposed exhibit.)

Q. Have you observed it?

A. Yes, sir.

Q. What is it?

A. It is another vial. This contains 51 milligrams of gold from the same dump and it represents four pans of material.

Q. Which you took from the dump?

A. Which I took from the dump.

Q. I hand you Defendant's Identification I and ask you to observe it, please.

(Witness examined vial.)

Q. Have you observed it?

A. Yes, sir.

Q. Do you know what it is? [285]

A. Yes, sir. It is another vial which represents

(Testimony of Douglas Colp.)

four pans of material. Actual weight is 19 milligrams, and it is taken taken from below the half-way mark from the surface of the same dump.

Q. I hand you Defendant's Identification J and ask you to observe it, please.

(Witness examined vial.)

Q. Have you observed it? A. Yes, sir.

Q. Can you identify it?

A. Yes, sir, it is the result of eight pans of material taken around the perimeter of the dump. Its actual weight is 20 milligrams.

Q. I hand you Defendant's Identification K and ask you to observe it.

(Witness examined vial.)

Q. Do you know what it is?

A. Yes, sir. It is another sample representing six pans of material from this dump. Its actual weight is 42 milligrams and it is taken from approximately half way down the pile.

Mr. Cole: At this time the defendant moves for admission into evidence of Plaintiffs' Identifications F through K.

Mr. Taylor: To which we are going to object, Your Honor, upon the grounds there is no showing that these proposed samples were properly taken, whether the dump came from the mine [286] operated by the plaintiffs, whether the gravel and muck in which the gold was carried was in its natural state, how long the dump had been there, and we think the introduction of these vials, Your Honor,

(Testimony of Douglas Colp.)

would be highly prejudicial under those circumstances; that there is no showing as to where these came from and, if the Court please, I would surely like to argue this point.

The Court: Well, I don't know how important it is, but I notice that you didn't object to the testimony of the witness all the way through, but when it came to offering the Identifications you objected to the offer for the first time.

Mr. Taylor: I certainly did, Your Honor.

The Court: But there was no objection to the testimony of the witness. I will reserve the ruling.

Mr. Taylor: I thought he would connect it up, but he has not, so I have to object, Your Honor. He hasn't shown it came from the mine of the plaintiffs.

The Court: I am going to reserve ruling until I excuse the jury for the four o'clock recess.

Q. (By Mr. Cole): Mr. Colp, after you took all these samples, did you weigh them?

A. Yes, I did.

Q. And how much did the total weight come to?

A. The total weight came to 223 milligrams, or explaining that a little bit further—— [287]

Mr. Taylor: Just a moment. No explanation has been called for.

The Court: The total weight was 223 milligrams?

The Witness: That is right, sir.

Q. (By Mr. Cole): How much is the value of a milligram of gold?

(Testimony of Douglas Colp.)

A. There are, for estimating purposes——

Mr. Taylor: Just a moment. I am going to object. I don't believe that this gentleman is qualified as to the valuation of gold.

The Court: Objection overruled. He may answer.

A. (Continuing) A milligram, for estimating purposes, there are ten milligrams for every cent. In other words, there are 10 milligrams per cent. In other words, this 223 milligrams represents 223 cents, and that is based on the fact that gold is priced at \$35 an ounce if it is 1,000 fine. Gold is not usually 1,000 fine. It is usually a proportion of that, and in this locality it is around 880, 890 fine. So 890 fine would represent 80/100's of 35, which is around \$31 an ounce, and there are 31,000 milligrams, roughly, 31,000 milligrams of gold in each ounce. So consequently, breaking that down to cents, there are 10 milligrams for each penny. So we use that for estimating purposes. We use that milligram because it comes out conservatively to the one zero figure. Any time you just divide your milligrams by ten and then you have got your cents. It is a handy conversion [288] to make.

Q. Did you figure the value of each pan?

A. Yes, sir.

Q. What was the result?

A. The average value of each pan was around seven-tenths of a cent. The thirty pans of material that I took, divided into the 223 milligrams, is just a little bit more than seven-tenths of a penny per pan.

(Testimony of Douglas Colp.)

Q. Did you calculate the value? Let me ask you this question: did the samples you took represent an adequate sample of that pile—— A. Yes.

Q. ——for accepted mining sampling techniques?

A. It is my opinion that the sampling was sufficient. I sampled it in two different ways. I sampled the value of the pile itself, representing the whole pile. Then I evaluated the value of the material of the upper half of the pile and I got a separate amount per cubic yard of the material on the upper part of the pile.

Q. From all your samples, what did you calculate the value per cubic yard to be of that pile?

A. The value of a cubic yard of the whole pile is \$1.30 a cubic yard. The value of the upper half of the pile is \$1.80 per cubic yard.

Q. Did you calculate the total number of yards in the pile? [289] A. I did.

Q. What did you calculate it to be?

A. I calculated that to be 424 cubic yards.

Q. Did you figure the total value of gold in the pile or dump?

A. Yes. I don't recall the right figure. It is around, multiplying 424 cubic yards by \$1.30 for your total average value of the whole pile you get something like \$550. Multiplying that 424 cubic yards by the maximum value of the pile, which is \$1.80, you get around \$760, I believe, would be a close top maximum value of the pile.

Q. Total value of gold in the pile?

A. Total value of gold in the pile.

(Testimony of Douglas Colp.)

Mr. Cole: That is all.

Mr. Taylor: May we have the customary recess, Your Honor?

The Court: Would you like to have the recess before cross-examination?

Mr. Taylor: Yes.

The Court: Very well. Members of the jury, we will take a ten-minute recess.

Clerk of Court: Court is recessed for ten minutes.

(Thereupon a ten-minute recess was taken.)

Clerk of Court: Court has reconvened.

Mr. Taylor: We will stipulate the jurors are all present, Your Honor. [290]

The Court: Very well, you may proceed.

### Cross Examination

Q. (By Mr. Taylor): Mr. Colp, who are you employed by at the present time?

A. I am working as a consultant, sir.

Q. On your own, as your own business?

A. That is right, in association with the Philleo Engineering Service. They are mainly an architectural firm, and I am the mining engineer with the firm.

Q. Now, who went with you to Fish Creek when you, as you claim, went down there on the third day of October of this year?

A. That is right, sir.

Q. Who went with you?

A. Nobody went with me on the third. Mr. Wil-



(Testimony of Douglas Colp.)

William McMartin went with me as an assistant when I measured the size of the dump.

Q. Are you sure you got the right dump?

A. I am satisfied that I did, sir, yes.

Q. You might have been over on the F. E. dredge tailings?

A. No, sir. I had one of the force, the thaw superintendent for the F. E. Company, Mr. Carl Oakland, at Fairbanks Creek, who had been there for years and years point the dump out to me, and he said that it was the only one with the gin pole on the right limit and when I got there I could be assured that that was it.

Q. Didn't you see two other dumps, two other gin poles, further to the south? [291]

A. No, sir. I saw other dumps, but I did not see other gin poles.

Q. Is that the first time you had ever been to that particular place?

A. The first time I have been to that particular piece of ground. I have been on Fish Creek and Fairbanks Creek before.

Q. Now, your method, you say, of sampling, who were you employed by to go out there and do that sampling?

A. I was employed by the defendant in this case.

Q. And what compensation are you receiving, Mr. Colp?

A. My consulting fees.

Q. What are they?

A. Do I have to state that, sir?

(Testimony of Douglas Colp.)

Q. Yes, sir, you do.

A. Eight dollars an hour.

Q. And are you getting eight dollars an hour for testifying here?

A. I don't get eight dollars an hour. I charge my client eight dollars an hour for the time that I spent on this.

Q. It would be kind of profitable if we slowed up this trial, wouldn't it? A. What is that?

Q. It would be kind of profitable for you if we slowed up the trial, is that right?

A. I am here as I am directed. [292]

Q. Now, did that dump look like it had been put there recently or sometime before?

A. It is not a new dump, sir.

Q. And when you went to test that dump, you say you went in some places two feet?

A. I went in various depths, because I wanted to find out if there was any change in the quantity of gold between the surface and down deeper, and that is the reason for the various depths. I didn't want to scoop up the surface where there might be an enrichment, there might not be a representative sample. Therefore, I went down in depth where the weather, the snow and rain and the effect of freezing and thawing would not affect the concentration of the gold.

Q. Did you go down into the drift while you were there? A. I did not.

Q. Could you get down into the drift?

A. No, sir.

(Testimony of Douglas Colp.)

Q. Why?

A. The shaft was full of water within six feet of the surface.

Q. Then, you don't know how long that dump had been there, Mr. Colp?

A. No, not definitely, no. Willows are growing on it to such an extent that it could be several years old.

Q. And that could have been put there, that gravel or dirt [293] or whatever it was, could have been put there to have you test it; is that right?

A. No, sir.

Q. What?

A. I don't see how you can figure that, sir.

Q. Now, isn't it a fact that that dump or—what did it consist of?

A. Mainly schist, bedrock, schist formation typical of this whole area, Birch Creek schist, some gravel and schist and sediment.

Q. Wasn't most of that dump on the top schist?

A. Pardon?

Q. Wasn't most of that dump on the top schist?

A. It was a schist formation, yes.

Q. And how much of it was gravel?

A. It was gravel which was composed of schist and quartz and the black sands were of hematite and zirconium and the regular bedrock mines.

Mr. Cole: Have you finished your answer?

The Witness: Yes. The dump is representative of any typical bedrock sample that you would get.

Q. (By Mr. Taylor): Just a moment, now. Have

(Testimony of Douglas Colp.)

you seen the bedrock on the Eastern Star Claim? Have you ever been down to take a look at the bedrock? [294]

A. I haven't been down there, no.

Q. Isn't it a fact that if that dump had been there for a number of years that there would be a considerable wearing or weathering of the rock, of the muck and of the gravel, that there would be a movement through it from rains, heavy rains would have the tendency to wash the finer stuff down further into the pile?

A. No, sir, not over your maximum depth of active layer. That is the reason for going down to those various depths. I got as good pans within six inches of the surface as I did two and a half feet down.

Q. Why didn't you go four feet in and see what you would get?

A. I didn't think it was necessary, sir.

Q. Don't you think you should prove here beyond a reasonable doubt that that gold that was in the gravel and the muck and the schist would wash down through that broken mass?

A. Gold in a schist, decomposed schist formation, such we have in most bedrocks, that material is practically impervious to gold and——

Mr. Cole: I am sorry to interrupt. I didn't get that answer. Impervious to what?

The Witness: It is practically impervious to gold being forced into it with ordinary rains and

(Testimony of Douglas Colp.)

weathering conditions. The top three or four inches may dilute itself but——

Mr. Taylor: Just a moment. I think you have lost sight of [295] the question.

Q. (By Mr. Taylor): I am asking you if it is a fact that heavy rains would wash that gold down through this rock and gravel and stuff down to a lower level. Gold is heavier than any of that other stuff, isn't it? A. That is right.

Q. And if you have water running down through the mass of that pile, it will naturally take that gold down with it, it will dislodge it from what it is hanging on to, won't it?

A. No, sir. It will take it right off of the surface but there is so much fines in that that it fills up the voids between the heavier particles of gravel, and the gold will not penetrate beyond the point, and I was below that point of any dilution, and any concentration.

Q. You say you had a lot of bedrock material and schist in there? A. Pardon?

Q. You had a lot of schist? A. Yes.

Q. So that would leave spaces between that schist and the gold would wash down?

A. There is also a lot of gravel and a lot of binding material.

Q. Did you go down and dig in and take any samples inside, [296] not on the ground, but inside of the dump? A. Inside of the dump?

Q. Yes. Did you shovel right at the surface of the ground and take any samples down there to

(Testimony of Douglas Colp.)

see if any of the gold content of that dump had been washed down onto the ground?

A. Yes, I sampled in the sluice box and around the perimeter and every place where I could——

Q. Wait a minute. Wait a minute.

Mr. Cole: No, let him answer the question.

Mr. Taylor: Well, I will. I won't object if you answer the question, but you are beating around—we might say you are beating around the dump.

Q. (By Mr. Taylor): I asked you if you had dug in at the base of this dump and gone in and taken some samples of the soil upon which this dump rested. A. No, sir.

Q. To ascertain whether or not the gold had percolated down through that soil.

A. No, sir.

Q. Don't you think that would have made a much fairer test, Mr. Colp, if you had done that?

A. No, sir.

Q. Do you give that answer for the purpose of earning your eight dollars an hours? [297]

A. Absolutely not, sir.

Q. You say that was the first time you were ever on the Eastern Star Claim?

A. That is right.

Q. How many dumps such as this have you tested before, Mr. Colp?

A. Oh, I would say in the neighborhood of eight or ten.

Q. And was that in the Fairbanks area?

(Testimony of Douglas Colp.)

A. Not all of them. In the interior of Alaska, yes.

Q. Did you sample any of the other dumps that were on the Eastern Star Claim?

A. No, sir.

Q. This is the one you went down to and somebody told you that it was the dump where there was a gin pole; is that right?

A. That is right.

Q. Were there any buildings there, Mr. Colp?.

A. Any buildings on that?

Q. Yes.           A. Yes, sir.

Q. What kind?

A. There was a boiler house near the shaft that contained a couple of boilers that were used for hoisting the material. There was a tool house next to the boiler house which contained a lot of pipe and drums and odds and ends of mining equipment, and then further to the east of the dump there was a dwelling that was [298] more or less obsolete at this time.

Q. What kind of a building was that?

A. That was a log building, as far as I remember. I just casually walked by it and looked at it.

Q. How big was it?

A. Oh, I don't know. Well, 20 by 30. Twenty by thirty is a rough estimate.

Q. You didn't go in there, though?

A. No. It looked like it was just a one-room building. It had a padlock on the front door.

(Testimony of Douglas Colp.)

Q. How about the back door, was it open?

A. I didn't go to the back door. And the window to the side, that would be the south side, was broken.

Q. Was that the only place you went on the claim, Mr. Cole?      A. Pardon?

Q. Is that the only place you went to on the Eastern Star Claim?

A. Yes, except just in the immediate vicinity of the dump, below the dump.

Q. How did you get down there?

A. Pardon?

Q. How did you get there?

A. I went to the end of the Fairbanks Creek operation, where the thaw pumps are for the Fairbanks Exploration Company, [299] thaw pumps on Fairbanks Creek, and I walked down on the right limit of Fairbanks Creek or Fish Creek and followed the right limit to a cat trail that led me right into the boiler house of this particular property, about a twenty-minute walk from—a fifteen or twenty-minute walk, depending on how much energy you wanted to use, from the end of the——

Q. Was there a road to it?

A. No road as such; however, there was an old cat road and there is a foot bridge across at the foot of the hill, but there had been tractors in there hauling wood to the site, to the shaft.

Q. How was the weather while you were there?

A. Very nice. It had been after a snow. There



(Testimony of Douglas Colp.)

had been about two inches of snow but at the time that I spent there the temperature was in the low forties, I believe.

Q. And how long were you there?

A. Three days.

Q. How long? A. Three days.

Q. And how were the nights? cold?

A. No, I wasn't there at night.

Q. What?

A. I was just there during the day for three days.

Q. And did this muck in the dump in this, was any of it frozen and hung together? [300]

A. Yes, sir. The top three inches were frozen. A few minutes with a pick would break that upper crust and then you can go on down without any obstruction from frost.

Q. You don't know how long that dump has been there, then, Mr. Colp?

A. No, I could guess, but I don't know how long.

Mr. Taylor: I believe that is all.

#### Redirect Examination

Q. (By Mr. Cole): When you were employed, Mr. Colp, was there any statement made to you concerning the results of your findings?

A. My results——

Mr. Taylor: Just a moment. Just moment. I am going to object to the question, Your Honor. It would be self-serving.

The Court: He may answer.

(Testimony of Douglas Colp.)

Q. (By Mr. Cole): The results which were desired?  
A. No, sir.

Mr. Cole: That is all.

(Witness excused.)

Mr. Cole: The defendant calls Ted Mathews.

TED C. MATHEWS

called as a witness on behalf of the defendant, after being duly sworn, testified as follows: [301]

Q. (By Mr. Cole): What is your name, sir?

A. Ted C. Mathews.

Q. What is your occupation, Mr. Mathews?

A. I am a mining engineer.

Q. Where do you live now?

A. 200 Wells Street, in Fairbanks.

Q. How long have you lived in Fairbanks, sir?

A. Since 1936 my home has been here. Part of my time has been spent out on the various mining operations, however.

Q. Are you married?      A. Yes, sir.

Q. Do you have any children?

A. Three boys.

Q. Have you had any formal training in mining and mining engineering?

A. Yes, I graduated from the University of Alaska in 1938 with degrees of Bachelor of Science in Mining Engineering and Bachelor of Mining Engineering.

Mr. Taylor: We will stipulate, Your Honor, that Mr. Mathews is a qualified mining engineer.

(Testimony of Ted C. Mathews.)

Mr. Cole: I would like to show his experience.

The Court: Very well, you may proceed. [302]

Q. (By Mr. Cole): And what practical experience or training in mining and mining operations and placer evaluations have you had since and before graduation?

A. Before graduation I was an engineer for the F. E. Company, and after graduation in 1938 I was Manager of the American Creek Operating Company, a company that operated a small dredging operation at American Creek in the Manley Hot Springs district. That ground we worked out in 1940, and then I became manager of the company called Gold Mines, Limited, who were running an open cut mining operation on the upper end of American Creek, and then several winters have been spent in prospecting for dredging ground in various places in Alaska prior to the war.

Since the war, I have done no active mining; however, I have been a consulting engineering since 1940, when I registered in the Territory and I have carried out from time to time mine evaluation work since we closed down the operating mine at American Creek.

Q. Mr. Mathews, is it possible to estimate the gold-bearing content of an area of placer mining ground without first sampling it?

A. Well, an evaluation requires sampling. There is no other way in which you can know what the value per cubic yard is of placer ground without

(Testimony of Ted C. Mathews.)

first extracting samples, and those samples should be representative of the ground that is being [303] under consideration.

Q. In a placer drift mining operation, what would be the nature and the number of samples which you would have to take of an area before you could give an estimate of its gold-bearing content?

Mr. Taylor: Just a moment, Mr. Mathews. I am going to object to the question as too indefinite and not applicable to any particular type mining and is not applicable to the question now before the Court.

The Court: The objection is overruled. The witness may answer if he understands the question. Do you wish to have it read, Mr. Mathews?

The Witness: Would you please repeat the question?

(Thereupon the reporter read the question.)

A. Well, in any placer deposit, as I stated, you should take a sufficient number of representative samples so that your results would be the same as the total value. Now, there are some variables that enter into the number of samples that you might have to take. One would be the character of the gold, whether it is fine or coarse, and where the gold is coarse there are, you might say, less pieces scattered out through the gravel and you would conceivably have to take more samples and larger ones.

(Testimony of Ted C. Mathews.)

The other thing that would determine probably the spacing of your samples would be the manner in which the ground was going [304] to be worked. If it were a high unit cost, that is, a high cost per yard of extraction and a mining method was being used in which blocks of ground might be eliminated from the total mining, then it would be advantageous to put holes on very close spacing. By that I would say probably fifty foot centers or maybe probably 25-foot centers. If the valuation was being made for a dredging operation where the ground has to be stripped and thawed and worked as a continuous block, then the holes need not be put so close together because it would not be possible to eliminate a small portion of the ground. You would have to take it all.

Q. (By Mr. Cole): Is there any way in which, say, from a drift mining operation, it is possible to predict whether the amount of ground which lies ahead of the drift is profitable ground without sampling it?

A. Not definitely, no. I would say the presence of good ground in a drift would be an indication that you might expect more ahead of you, but it would be no valuation such as we would require for financing purposes.

Q. Mining operation?

A. Yes. That doesn't mean that all operations have been carried on in that manner. Many mines have been started and the operators have worked

(Testimony of Ted C. Mathews.)

them without proper sampling and generally they have, as we say in the business, lost their shirt. The company that is most successful in the area in mining has been [305] the United States Smelting Company, and has probably also been the most exact in their prospecting methods.

Q. What results have they found in actual mining as compared with their sampling?

A. I wouldn't be prepared to say what their ratio is.

Q. Mr. Mathews, I hand you Defendant's Exhibit 1 and ask you to observe it, please.

Have you observed it?      A. Yes, sir.

Q. Can you identify it, or do you recognize it?

A. It is a picture of the dump on the Stepovich property.

Q. Have you recently had occasion to go on that ground?

A. Yes. I was engaged by the attorney for the defense, who gave an independent evaluation of the value per cubic yard of the material on the drift dump shown there.

Q. When you were employed, Mr. Mathews, were you told that a prior—

Mr. Taylor: Just a moment. We are going to object to what he was told, Your Honor.

The Court: It looks like the objection is well taken. I don't know what the—

Mr. Cole: It is preliminary, Your Honor.

Mr. Taylor: Still object.

(Testimony of Ted C. Mathews.)

Mr. Cole: It has no hearsay. [306]

The Court: I will risk it. You may proceed.

Q. (By Mr. Cole): Were you told that a previous analysis had been made?

A. Yes, I was told that another engineer had made an evaluation of the ground but that you wanted an independent evaluation and that you didn't care that I knew what the results were of the previous engineer's work.

Q. Were you told of the previous results prior to your investigation?

A. No, sir; I didn't know what they were.

Q. What did you do when you went upon the ground, Mr. Mathews?

A. I rigged up some of the stuff around there for a place to pan and sized up the dump, and decided that probably two different generations of material were present, and that I would sample the two portions separately.

Q. What led you to that conclusion?

A. If you will look at the photograph——

Q. You may illustrate on the photograph and you may step down.

A. If you will look at the photograph here you will see that there is a pile of material here (indicating) and that there is another pile on the other side and that in between is what I consider to be a later pile, right in between there (indicating).

Q. And then what did you do?

A. When I found that, what I consider to be

(Testimony of Ted C. Mathews.)

the later material piled up there, I dug five holes, one at the top and one toward the base of each perimeter of the pile. That would be four around the small pile on top and one in the center. Those were dug approximately one foot deep or a little deeper and then two pans were taken from the bottom of each hole and panned out.

I counted the colors in each pan and put these concentrate samples with the colors in a separate container and kept the materials obtained from the upper portion of the pile separate from that obtained from the lower portion and I weighed it out separately, and those samples of the gold that I got I brought along (producing vials).

Q. Do you consider your method of sampling of that pile or dump to be a representative sample?

A. Yes, sir; I do.

Clerk of Court: Defendant's Identifications L and M.

(The two vials produced by witness Mathews were marked Defendant's Identifications L and M, respectively.)

Q. (By Mr. Cole): When you observed the dump, did you notice any other holes or excavations had made in it?

A. Yes, it appeared that someone had done a pretty thorough job of sampling it prior to my arrival. [308]

Q. Did those holes and excavations represent an adequate sampling of the dump, in your opinion?

Mr. Taylor: Just a moment. We object to that,



(Testimony of Ted C. Mathews.)

Your Honor, on the ground that it is entirely incompetent, irrelevant and immaterial, as to what he thinks somebody else did.

The Court: He is testifying as to his opinions based on what he saw, and it may stand.

A. In my opinion, the dump was adequately sampled, yes, sir.

Q. (By Mr. Cole): I hand you Defendant's Identification L, Mr. Mathews, and ask that you observe it, please.

(The witness examined the proposed exhibit.)

Q. Have you observed it? A. Yes.

Q. Can you identify it? A. Yes.

Q. What is that?

A. That vial contains the gold that was panned from the upper portion of the dump and contains 136 milligrams. There were ten pans of material represented in that extraction.

Q. Ten pans? A. That is right.

Q. I hand you Defendant's Identification M and ask you to observe that, please. [309]

(The witness examined the proposed exhibit.)

Q. Have you observed it? A. Yes.

Q. Can you identify that?

A. Yes, this vial contains the gold that was panned from the lower portion of the dump. It contains 73 milligrams and represents the concentrate from 12 pans which were taken from six holes in the lower portion of the dump.

(Mr. Cole handed the proposed exhibits to Mr. Taylor.)

(Testimony of Ted C. Mathews.)

Q. And then what did you do, Mr. Mathews, in the sampling and evaluation process?

A. Well, as I was saying, the sampling was carried out separately from the two portions of the pile and the concentrates were kept separate in the two portions and the concentrates were cleaned—later they were brought in and cleaned in my office at home and weighed. An estimate, although it wasn't my understanding that I was to make an accurate estimate of the quantity of material in the pile, I did make some measurements and concluded that the upper portion, that is, what I considered to be the later material, contained 22 cubic yards and that lower part of the dump, that which I considered had been cleaned up previously to the extent that it could flow to the boxes, was about 420 yards or 410 yards, if I recall.

Q. Did you determine the value per cubic yard of the gravel in what you call the upper [310] dump?

A. Yes, my valuation was for the upper part of the dump, that is, what I considered to be put there later, was \$2.04 per cubic yard, and that from the lower position was 90 cents per cubic yard.

Q. How did you reach that determination, Mr. Mathews?

A. Well, these pans that I took contained a given volume of gravel. The way I take them there is 150 pans in a cubic yard, and the total amount of gold that was extracted in one case from ten pans was weighed and calculated against the quan-

(Testimony of Ted C. Mathews.)

tity of gravel used for the samples and the value per cubic yard determined in each case.

Q. Perhaps I was not attentive, but did you state the value per cubic yard in the lower part of the dump?

A. In the lower part of the dump I got 90 cents per cubic yard.

Mr. Cole: That is all, Mr. Mathews.

### Cross Examination

Q. (By Mr. Taylor): Mr. Mathews, do you know where that material came from that you sampled?

A. I wasn't there when it was dumped there, but it had to come out of the shaft because it was underneath the guy line of this——

Q. Now, on that later material that had been piled on there, did that consist mostly of schist?

A. I would say schist gravel and schist bedrock and decomposed bedrock.

Q. And did that look to you to be put there at a later time than the bigger part that was underneath?      A. Yes, sir.

Q. Had you ever been on the Eastern Star Claim before, Mr. Mathews?

A. I don't know the name of the claim, but I was on it. I had never been at this particular operation before, although I had been at Fish Creek a good many times.

Q. You don't know, then, whether that is the claim that is the subject matter of this suit, then?

(Testimony of Ted C. Mathews.)

A. I don't know the name of the claim, no. I was just asked to sample the dump.

Q. And were you paid for it, Mr. Mathews?

A. Yes, sir. I haven't been paid for it yet, but I will.

Q. You hope or expect?           A. I will.

Q. What were your charges?

A. My consulting fees are the same for every one, \$100 a day.

Q. I suppose, getting a consulting fee like that, you have a certain loyalty to your client?

A. No, sir, a mining engineer is asked to go out and do a job and get the facts. He is paid for facts. That is the reason [312] that he is hired by people. There is no particular loyalty to a client, no, except to do the best job that you can for him to arrive at the best accurate conclusion you can.

Q. Isn't it a fact that these samples you took were practically all surface samples, were they not?

A. No, the samples were from a depth of from one foot to one and half feet below the surface of the dump. Of course, the material on the dump originally did come from underneath in the mine.

Q. And did it show it had been there for a number of years?

A. Yes, I would say it had been there for a considerable number of years.

Q. But it seemed to be two different generations of material, one had been there longer than the other; is that right?

(Testimony of Ted C. Mathews.)

A. That's right. I would not want to say how much time elapsed between the two piles. I wouldn't say from the looks of the windrows, I wouldn't say it was long. I would say not more than a year apart or probably less.

Q. And now, wouldn't it be possible that when a dump is broken schist and gravel that the gradual weathering, the rains, and the melting snows and the freezing and thawing, would cause the heavier stuff to kind of percolate down between that gravel just the same as it does when it is deposited in a [313] creek bed or in a crevice some place?

A. Well, sir, I would say you have two entirely different conditions. When you take a pile of gravel schist and bedrock and decomposed bedrock or clay such as you have in a pile and it is subjected to rains and thawing and freezing, there may be some washing off of a portion of the material that is on the top of the pile.

As the lighter material was eliminated, then you would tend to get a concentration of gold at the surface. That is the reason that the holes were dug deep enough to get away from any possible surface segregation.

The gold could not penetrate into the pile because in order for it to be dislodged, one would first have to move the lighter material from the pile in order for the gold to work down, the same as you do in a gold pan.

When these pay streaks were formed here, the

(Testimony of Ted C. Mathews.)

bedrock, or the pay is on bedrock and is moved ahead on the pay streak as the gravel erodes the bedrock surface and it works ahead. In the Fairbanks district these pay streaks are practically all on bedrock.

Q. And these pay streaks sometimes, do they extend over a considerable area, that is, not an area, but for a considerable length, do they not?

A. Yes, in the case of some of the creeks, such as Gold Stream out here, the length of the pay streak is measured in miles [314] and they are within perhaps a mile.

Q. Now, Mr. Mathews, we have here underground workings of the Eastern Star Claim. It shows a shaft here 93 feet deep, and at the base of the shaft is an abandoned tunnel, which was evidently mined out, and from here on out here, the broken lines indicate drifts that have been abandoned. Then the drift was carried over here and out here (indicating) to a drill hole and then they came back and up to here and over to where the plaintiffs found gravel that went from fifty cents to a dollar and half a pan.

Mr. Cole: That is their testimony.

Mr. Taylor: What?

Mr. Cole: I was saying that is their testimony.

Mr. Taylor: That is their testimony until proven otherwise.

Q. (By Mr. Taylor): (Continuing) So they then, when they found that pay, then they went

(Testimony of Ted C. Mathews.)

up 30 feet along that pay line, 30 feet to the other side and along the face of that pay there they——

Mr. Cole: Your Honor, I am going to object to Mr. Taylor's recital of the evidence. If he wants to ask the witness a hypothetical question, I will be happy, but he recites the evidence.

The Court: Yes, I think you can put the question, Mr. Taylor. Proceed.

Q. (By Mr. Taylor): And they sampled along the—— [315]

Mr. Cole: The same objection.

The Court: Yes. You see the objection is that instead of asking a hypothetical question you are relating your theory of the evidence.

Mr. Taylor: Oh, no, your Honor. Just what was testified to. It is not a hypothetical question, your Honor. It is putting the evidence into a question so that this witness will have an intelligent knowledge of what was done and what was found and then ask him from that what would be his opinion.

The Court: Well, you proceed, subject to objection and ruling.

Q. (By Mr. Taylor): (Continuing) Now, then, that was panned intensively and those value ran the full 60 feet of the face. Then the hose, the pipe and steam was brought in and they put in 10 points and they thawed in there 12 feet and, as they thawed and removed the muck, they continuously panned and the same values——

Mr. Cole: Now, I make the same objection, your Honor, that it is not a question. It is relating

(Testimony of Ted C. Mathews.)

the evidence. I would like to allow him to continue but he just doesn't put it in a question form, so I object to his continuing reciting the evidence.

The Court: Yes. I don't see that you are coming to a question, Mr. Taylor. What you are doing is giving a resumé of the plaintiffs' evidence.

Mr. Taylor: Yes, that is what I am doing, your Honor. [316]

The Court: Proceed.

Q. (By Mr. Taylor): (Continuing) And that upon removing this first 12 feet which they thawed along the entire face of the pay streak, they found that the values had increased.

Now, with a showing like that, Mr. Mathews, would you, would it be your opinion that this pay shown might extend indefinitely out to the boundaries of the claim and also extend indefinitely the other way?

A. Well, sir, I would say that without other evidence, no. In order to evaluate a pay streak, you are trying to determine a volume of material. In order to get a volume, you have to have three dimensions.

Q. That's right.

A. If you can block out a block in three dimensions with some values which you can average, then I would say you have every reason to believe that that would be the value of that block, providing you have enough sample, but——

Q. Well, now——

Mr. Cole: Let him continue the answer, please.



(Testimony of Ted C. Mathews.)

The Court: Yes. He was asked a question.

Mr. Taylor: Go ahead, Ted.

A. (Continuing) Where you have values on one side of a block or at one position in the pay streak, I don't think that you can definitely project those values throughout the block. [317] In other words, you have to have, as we say, three dimensions. It would be evident that it would be a good idea to put some more drill holes out there to find out. That would be my opinion.

Q. Now, Mr. Mathews, along that line, I will carry that a little further. They did remove——

Mr. Cole: I am going to object on the ground that if he wants to ask a question, it is perfectly all right, but to argue the case to the jury again and over and over is prejudicial.

The Court: I don't think it is right to keep rehashing the testimony.

Mr. Taylor: Your Honor, now I want to call the Court's attention to the fact that Mr. Mathews said if he had three sides he could answer the question better. I was just going to elucidate that we did have three sides, that we took out a block of ground six feet high, 60 feet long, and 12 feet back.

The Court: Then ask him the hypothetical question, if the evidence shows that.

Mr. Taylor: Yes.

Q. (By Mr. Taylor): If the evidence showed that we did remove a block of that gravel and muck that was frozen, of course, six feet high,

(Testimony of Ted C. Mathews.)

12 feet back, and 60 feet long, and the value still maintained, do you think it would be profitable to pursue that mining at fifty cents to a dollar and a half per pan? [318]

A. I wouldn't know, Mr. Taylor, because you have taken, as I understand your description, you have taken a good sample along 60 feet of the drift. Now, if you were going to extend that into an area where you had no drill holes, then I would say you didn't have the ground evaluated, no, sir.

Let me show you what I mean.

As I understand, this 60 feet was drifted out (indicating).

Mr. Cole: Mr. Mathews, could you step to one side and let the jury see?

A. (Continuing) This 60 feet was drifted out. Now, the question is to what extent does the gold recovered from this 60 feet evaluate the block of ground from this limit (indicating) to this limit of the creek; is that right?

Q. (By Mr. Taylor): That is right.

A. Then, I would say it evaluates this block, and would be a good reason to put some drill holes out here (indicating), out here (indicating) and back here (indicating), where they were going to drift, to find out whether those values extended out to make enough volume to justify the mine.

Q. If we could get \$94.50 a yard, do you think it would be feasible to mine it?

A. What they mined, yes, but I wouldn't want

(Testimony of Ted C. Mathews.)

to project this valuation ahead in ground any distance.

Q. I mean that if—— [319]

A. Because——

Q. There is a possibility of that pay streak, though, extending a considerable way so it might reach out——

A. There is a possibility.

Q. It might extend both ways?

A. There is a possibility it may extend. We don't know, in this case. Let me say that I have mined ground that would go perhaps five or six hundred dollars a yard and ten feet away there would be nothing.

Q. I might also state that the samples were taken from the top six feet up and picked out of the muck down to bedrock. That is the way it was sampled. A. Yes.

Q. And what would you say as to such a showing as that? In your opinion, would that be a good showing?

A. It would certainly be a good showing. It wouldn't be evaluating the ground, in my estimation.

Q. For a big operation?

A. To go ahead and spend money on additional operations, no, I wouldn't.

Q. Well, if they were already working in there towards that and did find it and were taking it out, they should continue mining, shouldn't they?

(Testimony of Ted C. Mathews.)

A. For as long as they were taking out that kind of money, absolutely. [320]

Mr. Taylor: That is all.

Redirect Examination

Q. (By Mr. Cole): But you couldn't determine whether they would operate profitably as they continued?

A. As long as they had ground that went as high in value as Mr. Taylor speaks of, they could certainly make money, but they would never know when ten feet away they might run out.

Mr. Cole: That is all, Mr. Mathews.

Mr. Taylor: That is all.

(Witness excused.)

Mr. Taylor: Can we take the adjournment, your Honor?

The Court: I would like to have counsel remain, but first I would like to inquire of the defendant: can you state how many more witnesses you expect to call?

Mr. Cole: I think that is the defendant's last witness, your Honor, but I would like to reserve the final statement until tomorrow at ten.

The Court: No, I am not attempting to have you commit yourself definitely. I am merely trying to estimate how much time we have.

Mr. Cole: I believe that is our last witness.

The Court: Mr. Taylor, do you contemplate rebuttal witnesses?

Mr. Taylor: Yes, your Honor, I have possibly

two witnesses [321] on rebuttal. I think they will both be short, though.

The Court: I would like to have the jury go until tomorrow morning. Members of the jury, your duties today are concluded, and I ask that you heed the admonition I have previously given to you, and please report to your places at ten o'clock tomorrow morning.

(Thereupon the jury left the courtroom.)

The Court: Now, I want the record to show that the jury is gone, and I notice, Mr. Cole, that you did not offer Identifications L and M. Perhaps you had some good reason. There is no reason that you must, of course, have offered it by this time.

Mr. Cole: The reason I did not, your Honor, is because the Court stated that it wanted to reserve ruling on others and I thought we could take them in all together.

The Court: I appreciate that, and so now I am wondering if you wish to make the offer at this time and give counsel an opportunity to object and perhaps the Court can rule.

Mr. Cole: Yes, your Honor. The defendant moves for admission into evidence of Defendant's Identifications F through K, inclusive, and Identifications of Defendant L and M.

Mr. Taylor: To which the plaintiffs renew the objections, your Honor, upon the grounds stated before that there is no evidence to connect this gold in those piles with any dump that was taken out by the plaintiffs.

The Court: The reason I called it to counsel's attention [322] tonight before we adjourned is because I am very much perturbed about the offers, and I find the same thing is true with the testimony of the witness Ted Mathews. For some reason, counsel for the plaintiffs made no objection to all his testimony. He testified to his going to the mine and making the samples of these piles and testified as to the results and not one objection made to any of his testimony and, as a matter of fact, the only objection made is now made after the offer of the Identification, and I found that same thing true of the testimony of the witness Douglas Colp. The defendant sat back and let the witness testify to everything, and there was no objection made until the Identifications were offered into evidence.

I rather believe had counsel offered timely objections to the testimony of the witness Colp that I would have been inclined to sustain the objection to his testimony as to an evaluation that was made as recently as October 3rd, and of course what is true of the witness Colp would also be true of the witness Ted Mathews. I feel that the defendant had a duty to establish with more certainty that the pile was one and the same pile that was left by the plaintiffs, and I think that there is pretty scanty showing that it was the same pile that was examined by these two witnesses, and I think there is no showing that it wasn't tampered with. And I think that the burden is on the defendant to show, expecting to put in this type of evidence, that this

was one and the same pile and that it was in the same [323] condition as when it was removed by the plaintiffs, and it is a very serious matter. As I say, I am also perturbed because there was no objection made to the testimony of the witnesses. The only objection was to the Identifications.

That is a problem that perhaps you can help me with between now and nine-thirty tomorrow morning, because I want to rule on that at nine-thirty, and if you folks can give me some assistance, I assume that the defendant is going to argue that the matters raised by me go more to the weight than to the admissibility, but I am very concerned.

Mr. Cole: Your Honor, we are just talking about these exhibits or identifications.

The Court: That is what we are talking about now.

Mr. Taylor: Your Honor, I was under the impression that I cannot object until they are offered.

The Court: Certainly, you could not object to the Identification until it is offered in evidence, but what about the testimony? The witnesses testified to it all at great length without objection and that is all before the jury. They heard all that without any objection.

Mr. Taylor: I allowed them to testify because they hadn't identified the dump, your Honor.

The Court: The Identifications wouldn't identify the dump. You wouldn't wait until they get to the very gold itself. The testimony of the witnesses has been heard by the jury without any [324] ob-

jection on the part of the plaintiffs' counsel, so at nine-thirty tomorrow morning I will be glad to have you give me any assistance you can, either side, as to whether or not the Identifications are admissible in evidence, and Court will now adjourn until nine-thirty tomorrow morning. This case is continued until nine-thirty. Court will adjourn until nine o'clock.

Clerk of Court: Court is adjourned until nine o'clock tomorrow morning.

(Thereupon, at 5:20 p.m., October 16, 1957, an adjournment was taken until 9:30 a.m., October 17, 1957.)

Fairbanks, Alaska, October 17, 1957

Be It Remembered, that at 9:30 a.m., October 17, 1957, the trial of this cause was resumed, before the Honorable Vernon D. Forbes, District Judge:

Clerk of Court: Court is reconvened.

The Court: This morning, gentlemen, is there something we can accomplish at this time? It is now nine-thirty. The jury is to report at ten o'clock.

Let the record show the presence of Mr. Taylor and Mr. Cole.

First I might ask you: do you gentlemen have any requested instructions?

Mr. Taylor: I haven't right now, your Honor. I have some roughed up but my son is working on them at the present time and [325] they will



possibly be in condition to submit this morning or at noon, your Honor, or possibly before.

The Court: I would like to have you get them to me as soon as possible.

Mr. Taylor: I will as soon as we finish it. I will call and tell him you would like to have them as soon as possible.

The Court: Very well. Now, before ruling on the admissibility of Defendant's Identifications F through K and L and M, I will be pleased to hear from the defendant.

Mr. Cole: Well, first I think I should briefly state the evidence in the record. Actually, as to the Identifications, the testimony of the witness for the plaintiffs is that they left the dump out there when they left the property in 1942. The plaintiffs' evidence shows that a custodian was put on the property immediately when the Marshal came out, and remained there. There is testimony as to the size of the dump from plaintiffs' witnesses. There is testimony as to its location from plaintiffs' witnesses. There is testimony that the property has never been mined by the lessee of the property from 1942 to the present time, and there is testimony that there is a dump out on the property at the present time from which samples were taken. There is testimony that this dump is a matter of years old. It is difficult to predict its actual age. There is testimony that except for the top perhaps three inches the gold in a dump of this nature would not be affected by the elements in [326] the period of the years. There is

testimony that this mine froze up. It was frozen by November, by plaintiffs' witnesses, making it impossible to re-mine without six months' labor.

So there is testimony in the record, without objection from the plaintiffs, as to the operations, the sampling of the dump by the defendant's witnesses and the results of their samples that were offered as corollary supporting testimony to bolster the testimony of those witnesses.

What is the basic theory on which the defendant submits this evidence? It goes something like this, If I may use an analogy. Testimony that Mt. McKinley exists there today where it does is evidence of the fact that Mt. McKinley was there ten years ago, so the fact that there is a dump there now in the same location the plaintiffs' witnesses testified was the dump which they left certainly has bearing and relevancy that it is the very same dump which existed there ten years ago.

Yesterday the Court said, "Well, what about the proper foundation? There is no showing that this has not been tampered with."

Well, a Minnesota Court has held that an automobile tire which transferred through several hands and went to Minneapolis for repairs and back to another city from whence it came to Minneapolis was improperly excluded because there was no showing that it hadn't been tampered with. The Court says there is no such rule of law, no such requirement. The case is *Lestico* [327] v. *Kuehner*. That is 283 Northwestern 122. It is a Minnesota case decided in 1938.

It is also cited with approval at 136 Federal 2d, at 413, a Second Circuit case, in 1943, which incidentally also had to do with samples of aluminum ore taken, supposedly the same samples that had been shipped on a prior freight.

There is a little discussion of the theory of this in 2 Wigmore 437 (1). I will just read briefly. It says:

“When the existence of an object, condition, quality, or tendency at a given time is in issue, the prior existence of it is in human experience some indication of its probable persistence or continuance at a later period.

“The degree of probability of this continuance depends on the chances of intervening circumstances having occurred to bring the existence to an end. The possibility of such circumstances will depend almost entirely on the nature of the specific thing whose existence is in issue and the particular circumstances affecting it in the case in hand. That a soap-bubble was in existence half-an-hour ago affords no inference at all that it is in existence now; that Mt. Everest was in existence ten years ago is strong evidence that it exists yet; whether the fact of a tree’s existence a year ago will indicate its continued existence to-day will vary according to the nature of the tree and the conditions of life in the region. So far, [328] then, as the interval of time is concerned, no fixed rule can be laid down; the nature of the thing and the circumstances of the particular case must control.”

And Wigmore goes on to say:

“Similar considerations affect the use of subsequent existence as evidence of existence at the time in issue. Here the disturbing contingency is that some circumstance operating in the interval may have been the source of the subsequent existence, and the propriety of the inference will depend on the likelihood of such intervening circumstances having occurred and been the true origin. On landing at New York it can hardly be inferred that the steamer at the next dock has been there for a week; but it may usually be inferred that the dock has been there for some years; \* \* \*”

It says in the following paragraph:

“The opponent, on the principle of Explanation (ante, Sec. 34), may always attempt to explain away the effect of the evidence by showing that in the meantime other circumstances have occurred to raise a probability of change instead of continuance.”

I would like to just comment very briefly on the nature of the item. It is a large dump of gravel, in excess of 400 cubic yards. The probability that someone opened that mine, began operating it, is slight. The mine is on leased property, the Court would have to infer that somebody illegally trespassed [329] and operated the mine illegally, were this not to have any logical probative value.

It is also true that, considering the location in really a remote area of Alaska, there is much less probability that this dump has been tampered with

or is different than there is that many, many items of evidence which could have easily been tampered with or changed, and so forth, in a city or in criminal cases—much less probability, and I think the Court should also bear in mind this, that this is a case against a decedent's estate. The case itself was filed years after the alleged event.

In considering the difficulties of proof with which a defendant in a case of this type is faced, I think it is perfectly proper for a Court, if there is any question about evidence so far as its relevancy is concerned, to let the evidence in and let the jury decide whether it is probative or the degree of probative value which they want to give it, and give the adverse party, the opponent, an opportunity to explain it away and to show to the jury that because of certain considerations it is entitled to no weight, but I think that the defendant should have the benefit of whatever evidence it can produce as long as it is relevant, and not barred by an exclusionary rule of law.

Mr. Taylor: If the Court please, I have no quarrel with Wigmore. Never have. I think that the analogies that he has brought forth are true, but, your Honor, I think it is stretching [330] things too far to compare Mt. McKinley or Mt. Everest with a man-made dump eight or ten feet high and which is subject to being settled or being moved or being put through the sluice boxes at any time after the plaintiffs left the place.

First, I would call the Court's attention to the fact that neither one of the experts knew what

claim they were on. They said they didn't know. They were directed to go some place.

Another thing that Mr. Mathews—I have a lot of confidence in Mr. Mathews, and he testified that there was evidence of two generations of dumps, one younger than the older one.

Now, if we go back a little bit and analyze the testimony of the plaintiff Kupoff, let's see what they did. They arrived at the mine on the 22nd day of February of 1942. They immediately got the machinery in operation. They cleaned out the shaft, and then they started to clean out and bring to the surface sloughings in the tunnel and they were bringing them up, and I want to call the Court's attention to the fact that not until the latter part of May was there any opportunity to sluice any of that gravel. The first sluicing was in June, the latter part of May or June. That is what Mr. Kupoff said, and I think the dates of the clean-ups, of the deposits, would show that that is approximately correct, because I believe one was in the early part of June and one the 16th of June. That waste material was piled up there alongside the sluice boxes. This gin pole was up, your Honor, and the gin pole, they cannot swing it around any place [331] they wanted because the cables run down to the winch, and so they would necessarily have to, in the immediate vicinity, dump that waste material for a matter of some months.

So I have no doubt at all, if these two mining engineers were on the right property, but what

they were sampling some of the waste material that was taken out in the early part of the operations and which was not put through the sluice boxes because they couldn't put it through the sluice boxes, because there was no water in the early part of June, and I think also then the evidence of both Mr. Kupoff and Mr. Zukoev shows that when they got into what we will call the golden zone, their goal, that they had arrived at, where they were getting the big values, then they said they were putting all of that through the sluice boxes they could so that they could pay up the men and their bills.

The hopper was available for doing that as they were bringing that up. That is the ore they would naturally wash out. And we feel that the greater part of the proceeds of that gravel, gold-bearing gravel, was taken from the face of the pay streak, had been washed out, and the gold was in the sluice boxes, because they had some bills to meet, they had men working for them, and we feel, your Honor, that this sampling of that dump, if it was that dump, your Honor, would be samplings from the ore, or not the ore, but the material that was taken out in cleaning up the tunnel and driving through what was comparatively lean ground, although they did in three clean-ups, they got [332] \$1,100 in one clean-up and \$1,110 and \$1,296 in the third one, and then is when they hit this golden zone, and then they started to use that, and they would go out in the evening after they had dug 10 hours down below—not Mr. Kupoff, because Mr.

Kupoff was on top of the ground. He was doing the hoisting, taking care of the boilers and the winch and he was up there and he was the one that was doing the dumping of the ore, and he was the one that testified that they were dumping that in a hopper and putting it through the sluice boxes as fast as they could.

So I believe, your Honor, that the experts sampled that part of the material which was taken out of the drifts prior to the time they hit the pay streak, because they were trying to put all they could of the rich ore through the pay streak.

Now, Mr. Cole states that, "Well, who could have possibly ever done anything around there?" Mike Stepovich could have done it, your Honor. Mike Stepovich or others that were hired by him. Otherwise, why did Mike Stepovich by an illegal means, by an abuse of process of this Court, evict those men, eject them, take them off the ground. He took their food, everything that they owned except their blankets, and ordered them off. Did he do that just for the sheer love of being cruel or being sadistic? I think he did it, your Honor, because he knew that in those sluice boxes was a lot of gold. He knew that in the golden zone, in the pay streak, there was a lot more, and that is [333] what he wanted.

So there had been no contradiction of that evidence, your Honor. As it has not been contradicted, it must stand as the facts of the case.

We believe, your Honor, that the connection of these Identifications consisting of the little vials



of gold here is quite remote and it has not in any way been connected with the ore that was taken out of the pay streak by Mr. Kupoff and Mr. Zukoev and their associates. It might not be even from the same dump. Mrs. Stepovich said, yes, she said, there were three shafts on the place, but she didn't know, because there were four shafts on it. We know that. She said she doesn't know when that dump was there. She doesn't know when the picture was taken, and if it was taken in 1941, your Honor, that dump was there before the North Star Mining Company ever did any work, because if it was there in 1941, it was there in 1942.

The Court: I think her testimony was that it was not there in 1941.

Mr. Taylor: If the Court please, I believe, first, your Honor, the testimony was that this was a picture in 1941. That was the testimony.

Mr. Cole: No such testimony, your Honor.

Mr. Taylor: I believe that the counsel, himself, asked if that was——

The Court: I have a note that Mrs. Stepovich testified she [334] did not see the pile there in 1941.

Mr. Taylor: She did not testify that she saw it in 1942, your Honor, so we don't know whether that is the dump that the plaintiffs in this case got out or not, but apart from that, your Honor, that is so skeptical as to whether or not those samples were taken from the material from the high-grade deposit in that mine or whether it was from the material when they were driving the drifts to reach

the golden zone, and I don't believe, your Honor, that it would go to prove any of the elements of this case. I don't believe it would be a circumstance even that should be submitted to the jury in the fact that it was not shown by any competent evidence that it was connected in any way with the plaintiffs. It was an old dump and that old dump, your Honor, he said "many years," and then there was a later dump, and those are so intermingled, your Honor, that I think it would be requiring the jury to guess.

Also I would like to call the Court's attention in relation to this Exhibit 1, Defendant's Exhibit 1, we realize that in the operations prior to the time that Mr. Kupoff and Mr. Zukoev and their associates went onto the ground that there had been a shaft 93 feet deep sunk, a shaft seven by seven. That also in one direction that there had been a drift driven up to here (indicating) and another drift down into here (indicating) and another drift over here (indicating) about 75 or 100 feet. [335]

Your Honor, if that pile of stuff was not there, where did they put the debris, the gravel, and the dirt that came out of the shaft, those drifts (indicating) and that drift (indicating), if it wasn't piled up out there? Evidently Mrs. Stepovich at that time perhaps was suffering from astigmatism or some other eye trouble, because there would have to be a dump there. Your Honor, it couldn't be otherwise, unless they took wheelbarrows and scattered it all over the landscape, and I don't think

anybody would do that, your Honor. And we feel that this has not been connected up with this case sufficiently, your Honor, to allow that to be introduced as an exhibit.

Mr. Cole: May I make one remark, your Honor?

The Court: Yes.

Mr. Cole: I will be very brief.

First, Mrs. Stepovich testified that this was the Eastern Star Claim which her husband leased to the plaintiffs and we connected up the presence of the engineers that way.

I would like to say so far as the evidentiary point that arose yesterday in connection with the prior reported testimony and the admissions, I have authority for that proposition in McCormick, quite clear-cut, I think. I would like to introduce one statement in this transcript if I were allowed to cite that authority to the Court. If the Court approved the authority and allowed the admission into evidence of the prior statement of Mr. Kupoff, I think it would make this point clear. I would like [336] to cite that authority to the Court.

The Court: I will give you an opportunity to cite at this time from the transcript the admission that you contend was made by the party, so that I can determine whether or not it is an admission or whether it is pertinent.

Mr. Cole: Thank you.

The Court: Or whether it would be admissible under any rule.

Mr. Cole: On page 58 of the official transcript,

in answer to a question which is apparently up here:

“Q. Now, did you mine any of the dirt out of it, where you had struck it rich, where you got the rich pan?”

Following several objections between counsel, it says:

“A. Yes, we just begin start work on the face and what gravel is left out there was where that come out of that good pay.”

I would like to introduce that into evidence, also the other statements that they left it out there and don't know whether it was ever washed up by anyone.

The Court: Well, am I to construe your remarks this morning as a new offer of proof?

Mr. Cole: Yes, your Honor. That is true.

The Court: Well, I will deny the offer.

I am now going to the ruling on the objections to the offer [337] in evidence of Defendant's Identifications F through K and L and M. I don't know that I can accurately judge of myself, but I think that I am inclined to be liberal, perhaps too liberal, in letting evidence get before the jury that may be helpful to the jury in determining these serious matters, and the question before me is whether these Identifications in question should be permitted to go before the jury and whether or not they would be helpful in any way, and I am afraid that they

do not have the degree of accuracy that evidence should have.

In the first place, the dump was left there in 1942, 15 years ago, at which time an analysis might have been made.

The lawsuit was commenced about ten years ago. I believe the analysis could have been made at that time. I am not meaning that it must have been made then or it wouldn't be admissible, but when the defendant, who had an opportunity to have the analysis made during all of these years, comes in with such a late analysis, I think it is incumbent upon such a party to offer evidence that has a degree of convincingness that the pile that was analyzed was one and the same pile as left by the plaintiffs and that some evidence tending to show that it was in the same or similar condition as when it was left. I think the evidence is far too speculative and unreliable, and therefore I will sustain the objections to the offered evidence.

Now, I would like to check time with you gentlemen, not having a clock in the courtroom. [338]

Mr. Taylor: I have five minutes after ten, your Honor.

Mr. Cole: That is my time, your Honor.

The Court: Very well, I will adjust mine accordingly.

Are we ready for the jury now?

Let the jury, please, be brought in.

Mr. Taylor: If the Court please, could I have just a moment to call my son to tell him about the instructions that you might want?

The Court: Very well.

Mr. Taylor: I will just be a second.

The Court: We will take a five-minute recess.

Clerk of Court: Court is recessed for five minutes.

(Thereupon a five-minute recess was taken.)

(The jurors were brought into the courtroom and resumed their places in the jury box.)

Clerk of Court: Court is reconvened.

The Court: Would the parties like the roll call of the jury this morning?

Mr. Taylor: We will stipulate that the jurors together with the alternate are all present, your Honor.

Mr. Cole: And the defendant waives roll call.

The Court: Very well.

Mr. Cole: The defendant at this time rests, your Honor.

Mr. Taylor: The plaintiffs rest, your Honor.

The Court: Well, both parties having rested and neither party having yet requested any instructions, I assume that there will be some matters to be taken up out of the hearing of the jury.

Mr. Taylor: Yes, your Honor. I got in touch with my office a few moments ago and my son will be over in just a moment with the requested instruction that might be helpful.

Mr. Cole: Yes, your Honor.

The Court: I am thinking now of letting the jury go until two o'clock, hoping that we can be ready for summation at that time. Can anybody

suggest any better way of making use of the time without keeping the jury?

Mr. Taylor: I think, your Honor, that would be a very proper procedure. I don't doubt that the Court will have certain instructions and also would like to study any requested instructions. It is kind of unexpected that we rested this morning.

The Court: Yes. I didn't contemplate that there would be nothing for the jury so far today. I am hoping, of course, that there will be no delays at two o'clock, so that we can go right on.

Mr. Taylor: There will be no delay on the part of the plaintiffs.

Mr. Cole: The defendant is ready to proceed at this time, if Mr. Taylor is, to proceed with final argument at this time. I don't see any special reason for excusing the jury until two.

The Court: I assumed you had a motion. [340]

Mr. Cole: Yes, your Honor, which won't, I suppose, take too long, but I will leave that to the discretion of the Court.

The Court: I suppose counsel would like to know something about the instructions before arguing, and I know that I insist that I have your requested instructions; as a matter of fact, I should have had them before this.

Members of the jury, please heed the admonition I have previously given to you, and will you please return to your places at two o'clock?

(The jury left the courtroom.)

The Court: Now I am going to ask a question of

counsel. How soon can you have your requested instructions to me?

Mr. Taylor: I have just called the office and my son has got the short one. It was being typed up and I expect him over any time.

Mr. Cole: I don't think the defendant will have any requested instructions, your Honor.

The Court: Well, Mr. Cole, at this time, do you have a motion you wish to make?

Mr. Cole: Yes.

Well, at this time the defendant moves for a directed verdict for the defendant on the ground and for the reason that the plaintiffs have failed to prove any loss of profits and that there is not before the jury a prima facie case sufficient to submit to the jury. At the close of the plaintiffs case, this same [341] motion was made and decision was reserved on it.

I don't feel that there are many things to say in addition to what was said at that time. The plaintiffs' proof at that time was inadequate to show loss of profits and, in addition to that, your Honor, defendant's evidence through three qualified mining engineers was that there was no way, no possible way, to determine the gold-bearing content of ground beyond that which has actually been exposed and mined.

Mr. Mathews said, yes, that certainly it might have been \$94 a cubic yard where they were, but he said you never know whether ten feet beyond or one foot or two feet beyond there is nothing.

That was brought out in the testimony of Earl



Beistline showing the general characteristics and formations of placer mining deposits in the Fairbanks area and because of the way in which they are formed they have no ribbon flow, no continuity, and it is impossible to determine whether ground even contains gold unless it has been blocked out in three dimensions.

The testimony of Mr. Mathews is quite clear. Let me add that not one of these witnesses' testimony was shaken one iota on cross examination. There is no evidence as to how much gold-bearing gravel could have been recovered by the plaintiffs had they been allowed to continue operation of the mine, not one bit.

It is the testimony that not only must there be one or two [342] drill holes but there must be a block on 25 or 50 foot centers. No evidence of any drilling, no evidence of any sampling, no evidence ever has been presented by the plaintiffs with regard to the costs of the mining operations except that they had spent six thousand dollars or seven thousand dollars in the operation of that mine between February, 1942, and the time that they left the property.

The only showing is, your Honor, that they operated at a profit while they were operating—or at a loss. The only showing is that they operated at a loss of about three thousand dollars. That is our own proof.

There is no proof that had they been allowed to continue mining that they wouldn't have continued to have lost money, although it may appear from

their testimony that in the actual ground they were in there at that time they could have operated profitably.

There is no testimony of what would happen had they been allowed to continue. So I recite to the Court the cases earlier cited in connection with loss of profits and point out that those profits must not be uncertain and they must not be remote and they must not be speculative, and how can a jury, from the evidence they have before them, decide what the plaintiffs' loss of profits were, if any?

I reiterate, Courts have said there must be a past profitable showing which can be projected. There is no evidence of that. [343] And any jury, any person, attempting to ascertain whether or not the plaintiffs would have suffered a profit or a loss, or if a profit, how much, would be doing nothing but just sheer guesswork, conjecture, speculation as to whether they would have made one penny or lost their shirt.

At this time the defendant renews its motion made at the close of the plaintiffs' case and moves for a directed verdict at the close of the evidence.

The Court: I am going to reserve ruling on the defendant's motion for directed verdict, and in so doing I feel it proper to mention that I believe the motion has a good deal of merit, for several reasons.

I will submit the case to the jury with some misgivings, because I doubt whether the evidence is such that the jury could arrive at a just and proper verdict other than for the defendant.

I say that because there are so many things that

appear to me to be lacking in proof, and the burden of proof is on the plaintiffs. I think the evidence is unsatisfactory as to the value of the gold that was actually mined. I think that the evidence is unsatisfactory as to the quantity or quality of the gold that remained in the drift at the time they desisted or quit their operation. I think the evidence is unsatisfactory as to the amount that might have been recovered, the amount of gold that might have been recovered by the plaintiffs during the remainder of the lease. Those things trouble me terribly and [344] I think that there is a lack of evidence of what the cost of the recovery would have been to the plaintiffs. All those things are in very grave doubt, and I have difficulty seeing how a jury could reach an intelligent verdict based on the evidence.

The jury I don't believe can guess as to the depth of the vein that was struck. I don't believe they should be permitted to speculate that it may have gone back 100 feet or to the left a mile. I don't think they should be permitted to speculate as to how much might have been mined had it not been for the interference of the defendant, because those things, I believe, must be spelled out in more particularity for a jury, and I am troubled, but at this time I will reserve ruling.

Mr. Taylor: If the Court please, I believe if the Court would call upon me, I believe I could resolve that doubt.

The Court: At this time I resolve the doubt in favor of the—the doubt is in my mind and I ex-

pressed it, but you see, in reserving the ruling, I have resolved the doubt in favor of the plaintiffs at this time, so there is no object in calling on you for argument, because I have resolved those doubts in favor of the plaintiff in reserving the decision on the motion.

Mr. Taylor: I do have some cases right in point regarding mining along that line, your Honor, if the Court would like to listen to these cases.

The Court: I don't know if I have time to do that, but I [345] would be very happy to have your cases even at this late hour.

Mr. Taylor: They are all marked, your Honor.

The Court: On what point do the cases you have now bear, Mr. Taylor?

Mr. Taylor: As to values, and these cases hold that values in other parts of the mine can be considered by the jury, who are to assess damages, as being equivalent to those ores that were taken, just the same as we attempted to prove here that on the same pay streak——

The Court: We are talking now about the evidence that has been received as to whether or not it is sufficient to submit the case to the jury, and we are not now arguing——

Mr. Taylor: That would go to the evidence, your Honor, because I believe in this case we have the evidence of the engineers, who talked about these drillings, and all that. We have before us, your Honor, complete drillings, every twenty-five feet.

The Court: But they are not in evidence, Mr. Taylor.

Mr. Taylor: I know they are not in evidence, your Honor, but counsel complains they are not in evidence. When they were here he objected and didn't want them in evidence because he knew what they would show.

Then the next evidence, your Honor, is, as the mining engineers say, and I believe they are right, they make these borings and then what do they do after the borings? They pan the results. [346] So after all it comes back to the old gold panning the miners used from time immemorial, and so then what is the difference?

The Court: The difference, Mr. Taylor, is this: according to the testimony in this case the plaintiffs panned the gold that they took down from the surface, instead of panning or testing the gold beyond the surface. That is the difference.

Mr. Taylor: No, your Honor, I think that doubt should have been resolved by the Court because they not only, as they went into the face of the pay streak, that they would scrape this down—I want the Court to remember that this stuff was all frozen. It is a hard surface. So they scraped that off from six feet up from the ground to the bedrock and then they panned that and they see what it is. As they go in, they keep on doing it and they go clear across the face of it, but then they take out a block of the gold-bearing gravel six feet high, twelve feet wide, and sixty feet long. That is a proven value, your Honor, and that went, at the least estimate, would be fifty cents a pan. That is proven. There was nothing to contest that. That is

not only blocking that ore, but it is taking it out. It has been taken out and the testimony is here and it is undisputed and it was put through the boxes. They put it through the boxes because they wanted to get the money so they could pay their men. So you can't discount that one block there of six feet wide, by twelve by six feet. And they also then had another thaw in, and that was going on at the time that the Marshal came down and threw them [347] off and, as Mr. Mathews said, why, if they got values like that they should continue because they have got a good thing and they could make a good profit out of it.

The Court: Mr. Taylor, he did not say they should continue because there is gold beyond there. He said they would be justified in taking samples to determine it, and of course they would continue as long as they were getting this rich dirt.

Mr. Taylor: That is right.

The Court: But that is just the surface. There was no testimony of what was beyond the surface.

Mr. Taylor: Your Honor, they had proved it by taking out that where they left off, as they went 12 feet in they were in even better pay, according to Mr. Kupoff.

The Court: We have the testimony of what they were in, but we don't have the testimony of what was beyond what they were in. The testimony is here as to what they were in.

Mr. Taylor: But I would like to call the Court's attention to the fact that if that particular area showed these values, that the jury then can take

that into consideration as to saying whether or not there were other values.

Now, that is a Supreme Court case, your Honor, because where something is done with malice, such as was done in this case by the defendant, and it is difficult to establish the exact amount, that the jury has the right to consider from the value that has been placed on that that has been taken out, that [348] the same values would prevail in the other mining operations adjacent thereto.

The Court: How far?

Mr. Taylor: Until they run out of the gold.

The Court: Exactly.

Mr. Taylor: Yes, sir, and I want the Court to understand, though, in figuring this matter out, that block of material that they took out of there, is pretty close to \$16,000, your Honor, and we contend there was approximately \$16,000 in that sluice box, when they then were forcibly and unlawfully and maliciously ejected from the property.

We can show that to the jury from the values put on at the lowest pan that they got, which was fifty cents, and from fifty cents to a dollar, and the jury can say that there was an average of 75 cents a pan. It is for the jury to decide these facts.

The Court: The jury decides the facts, certainly, if we give them enough evidence to go on so they can base the decision on the facts.

Mr. Taylor: There was a late case, your Honor, *Schultz v. Pennsylvania Railroad*, the Supreme Court of the United States. That is in 76 Supreme Court 608, and it is the modern concept of the prov-

ince of the jury, even if they are disputed facts and they are circumstances that might be arrived at by the jury, should be allowed to go to the jury. They should let the jury's thoughts be heard on this matter. Even if there was an inference to be [349] drawn or an inference not to be drawn, the jury is the one to do that, your Honor.

The Court: I am going to ask you at this time, Mr. Taylor; I asked you yesterday: This is a suit for loss of profits, is it not?

Mr. Taylor: Yes, your Honor.

The Court: And what is your theory relative to the \$6,700 expended by the plaintiffs?

Mr. Taylor: Your Honor, I have two cases right directly in point, and they are mining cases, and they say in assessing the damages that the cost of operation of taking the money out is not to be considered where the taking was unlawful, by trespass, or in a case like this, by malicious ejection, and I would like to have the Court take a look at it.

The Court: I would like to have your citation, Mr. Taylor.

Mr. Taylor: This was a Supreme Court case, your Honor. It is the case of Benson Mining and Smelting Company v. Alta Mining and Smelting Company. It was a case in which——

The Court: Reported where?

Mr. Taylor: That was reported, your Honor, in Supreme Reporter, let's see, 145 U.S. at page 428, and it is reported in the Lawyer's Edition, 36 Law Edition, at page 765.



The Court: What do you contend the holding of that case is?

Mr. Taylor: That in this case, your Honor, the only other question is as to the measure of damages of a property something [350] such as this, where they took the ore out surreptitiously and trespassed. "The only other question is as to the measure of damages. The trial court found that the value of the ores, at the time of their conversion by the defendant, was \$11,716.65; that after the ores had been mined, and became chattels there had been expended by the defendant and others, in removing the ores from the mine, in assorting the same from the worthless rock, and in transferring the same to the smelter, the sum of \$7,985.83; and gave judgment for the difference, to wit, \$3,730.82, and interest. It also found that the entries and trespasses upon the Alta mine were with knowledge of plaintiff's ownership thereof, and that the defendant at the time it received the ores had knowledge that they came from the Alta mine, and were the property of the plaintiff; and there was testimony to support these findings."

"The contention of the appellant is, that there was error in not crediting it also with the cost of mining the ores. But as it received and converted them with knowledge that they belonged to the plaintiff, the ruling of the trial court was, within the decision in *Wooden-ware Company v. United States*, 106 U. S. 432, as liberal to the appellant as it had a right to expect."

In that case they did not allow them the cost of

removing it. We feel this could come under that, and we have another case along the same line. [351]

This is the one in Strathmore Coal Mining Co. v. Bayard Coal & Coke Co. It says:

“The measure of damages fixed by the first paragraph does not apply, if the party taking the coal was negligent, because it is only in the absence of fraud, negligence, or willful trespass that the rule applies. If ‘negligence’ as used in the first paragraph, is not embraced in one of the terms ‘furtively or in bad faith,’ as used in the second paragraph (and it would scarcely be contended that it is), then there is no part of the statute applicable to a case where there was negligence, and if it is included, then the appellant cannot complain of the measure of damages allowed, as it even got the benefit of the deduction for the cost of removing the coal to the mouth of the mines. But it is clear that the statute does not change the rule when the minerals are taken as the result of the negligence of the defendant.”

“Therefore, as the statute does not apply to this case, the measurement of damages applicable thereto is that which existed prior to the passage of the act, which is clearly stated in Barton Coal Co. v. Cox \* \* \*” “that the plaintiff is entitled in cases of this character ‘to recover such sum per ton as the jury may find the said coal so mined was worth first severed from its native bed, and before it was put upon mine cars, without deducting the expense of severing said coal from its native bed.’ ” [352]

That is the Strathmore Coal Mining Co. v.

Bayard Coal & Coke Co., 116 Atlantic, and the case starts on page 570.

So we feel, your Honor, that this was an illegal, malicious abuse of process for the purpose of ejecting the plaintiffs from this mine, that the defendant cannot be given any credit for the cost of operations. The plaintiffs are entitled to recover not only what they had expended but the anticipated profits also.

That is what these two cases contend, your Honor. Otherwise it would allow the defendant to profit by his own illegal acts.

The Court: Do you wish to be heard at all Mr. Cole at this time?

Mr. Cole: No, your Honor. I think those are trespass conversion cases and are not applicable here.

The Court: Now, gentlemen, I must of necessity place a deadline on requested instructions.

Mr. Taylor: I can give you these two (handing them to the Court.)

The Court: Have you served these on counsel for the defendant?

Mr. Taylor: I am going to give him a copy.

The Court: Get him to initial them.

Mr. Cole, I will give you until eleven-thirty.

Mr. Cole: Thank you, your Honor. [353]

The Court: I am thinking, gentlemen, that I might, at least I am going to try to have my proposed instructions ready so that you each have a copy of them by one-thirty and, if I am able to do

that, I would like to have the objections to them prior to the argument.

Very well, this case will now be recessed until one-thirty.

Clerk of Court: Court is recessed until one-thirty.

(Thereupon, at 11:00 a.m., a recess was taken until 1:30 p.m.)

Clerk of Court: Court is reconvened.

The Court: The proposed instructions are being numbered at this time and should be here in a moment.

I would like to discuss for a moment Defendant's Requested Instruction No. 1. Has that been served upon you, Mr. Taylor?

Mr. Taylor: Yes, your Honor.

The Court: I would like to discuss this. The requested instruction reads as follows:

"The value of the gold remaining in the sluice boxes in the Eastern Star Mining Claim when plaintiffs left the claim in 1942, if any, is not to be included in any award of damages you might make."

That is the entire instruction as requested, and I would like to have an explanation from counsel as to the theory behind that request. [354]

Mr. Cole: Well, the theory of plaintiffs' case is an action for a breach of covenant of quiet enjoyment and they have sued on the contract theory, seeking recovery for loss of profits, and therefore the only measure of damage which they

are entitled to is damages for loss of profits. Any gold which might have been out there, and I don't personally think there is enough evidence to be any evidence that any gold remained out there, or if there was, that there is any evidence that the defendant converted it. But since the theory of plaintiffs' case is one for breach of contract and the contract measure of damages being applied is loss of profits, he is not allowed to come into court at this time and now claim that the defendant converted any of the gold out there. That is the theory behind it, your Honor.

Mr. Taylor: If the Court please, I can't follow the defendant's contention in this, because that would be equivalent to saying that as the defendant got away with \$15,000 out of the sluice box, why, the plaintiffs would have no redress in regard to that. That would be the loss of the gold, the loss of the income. That is the main part of this case. It comes under the compensatory damages and, if they extracted gold-bearing gravels, dirt, from the mine, which from a reasonable interpretation of the evidence in the case would amount to some \$15,000 or better, and the greater part of that which they had put through the sluice boxes, they were working day and night to get that through, because they wanted to get the money to pay up their [355] men and expenses in the operation, and they felt they needed that to do it. Some of it might have been left at the dump, but the fact is, your Honor, that the defendant, himself, attached the gold that was in the sluice boxes. The

defendant is in the best position to know how much they got and to come in here and say what it was. He took over everything. He attached the dump and he attached the gold that was in the sluice boxes. The notices on here, which are in evidence, show, your Honor, that he did. I think the Circuit Court understood that that was an unlawful breach of the contract, that he used unlawful methods to break the contract, and that he did so. That would put a premium upon him breaking the contract in the way he did by getting the gold that was in the sluice boxes and say, "No, you can't have that. That belongs to the defendant," but the defendant took over the entire Eastern Star Mining Claim, including the groceries, the oil, the fuel, the gold in the sluice boxes, the dump, and retained control of that, your Honor, and if he did not recover anything from the sluice boxes, I think the defendant has had ample time to ascertain whether or not he did, but with the values that we have shown which was in the gravel that was taken out, I think from that the jury can follow that to a logical conclusion and infer from that evidence that there was so much gold in the sluice boxes, and I think it would destroy the theory of the plaintiffs' case to say that the plaintiff [356] could not recover for the amount of gold that they had worked for and paid the expenses of getting out. In fact, that instruction would practically destroy the plaintiffs' case as to recovery or compensation for the breach of contract.

The Court: I always worry when my theory of

a case seems to differ so greatly from the theory of counsel for the plaintiffs, particularly in this case. On previous occasions throughout this trial I have attempted to find out from the plaintiffs the theory on which recovery of 6,700-some-odd-dollars should be permitted as well as the loss of profits, and I have never been satisfied as to the plaintiffs' theory, and as I read the complaint even on the loss of profits, there seems to be a cut-off date. The plaintiffs seem to think, "Now, we have expended sixty-seven hundred dollars up to the time we were evicted. We are entitled to that on some theory. We are entitled to that money, and we would have, had we not been evicted, we would have extracted or recovered \$150,000 in gold. We would have done that, and \$50,000 of which would go to the defendant, and therefore we are entitled to \$100,000," negating any theory that the expense of extracting the gold should be considered. It looks just like plaintiffs contend that the expense of operation had nothing to do with this case and, as I see it, the case is one for loss of profits, and I think the jury must take into consideration what gold was recovered before the alleged breach, what gold would have been recovered after the eviction, [357] and after determining the total amount that was mined and would have been mined and deducting therefrom the expenses of the operation and royalties, and thus determined the amount of plaintiffs' damages. That is the only way I can see this lawsuit.

Mr. Taylor: If the Court please, in the case I

cited this morning, it holds just directly where the taking was unlawful, the eviction was unlawful, and then he took this stuff unlawfully, that you don't have to set off the costs of that against the amount that would be recovered. They are not to take that into consideration at all.

The Court: Then your suit isn't one for loss of profits at all, under your theory?

Mr. Taylor: Yes, it is, your Honor.

The Court: What is a profit? A profit is the difference between what is taken out and the cost of getting it. That creates a profit, while you say that you recover the full amount which you think was in the ground, and I say I have difficulty in going along with that, and under my theory, I must reject the defendant's requested instruction, because under my theory of the case, and of course I hope it is accurate, the jury must determine how much gold was taken out, how much would have been taken out had it not been for the eviction, and what the expenses were in what was taken out and what they would have been in extracting the remainder. If that is true, why, of course, I [358] cannot give the Defendant's Requested Instruction No. 1.

So at this time I refuse that requested instruction.

So, of course, you gentlemen are going to be shocked, at least the plaintiffs, will be shocked, I presume, at my proposed instructions, and I want to give you ample time to go over them, and I will give you time to point out wherein they are



erroneous and make all the objections you wish.

I see no other way to instruct the jury at this time. Now I will give you gentlemen until five minutes of two. Court will recess until then.

Clerk of Court: Court is at recess until five minutes of two.

(Thereupon a recess was taken.)

Clerk of Court: Court is reconvened.

The Court: Gentlemen, at this time are you prepared to state your objections to the proposed instructions?

Mr. Taylor: The plaintiffs are, your Honor.

The Court: Very well. I will hear from the plaintiffs first.

Mr. Taylor: These instructions are not numbered. It is a little difficult to call the Court's attention to them.

The Court: I thought they were. I am sorry.

Mr. Taylor: The pages are not. The instructions are, but the pages are not.

Our first exception to the instructions, your Honor, is to [359] Instruction No. 3, which appears on the third page of that instruction. I believe, your Honor, that the first paragraph, the second paragraph, and the third paragraph should be stricken, upon the grounds that there was no evidence adduced in this case to support the denial contained therein, and I think in that respect that the Court should instruct that the fact that the Court has set forth that they are denials, that that is no evidence that the denials were well taken unless there is evidence to support those denials.

It might be that the jury might consider that the mere fact the denial is made that it would be evidence that plaintiffs' allegations were not true.

The Court: Mr. Cole. Are you through, Mr. Taylor?

Mr. Taylor: Yes, your Honor, with that one.

The Court: Number three. I will hear from Mr. Cole.

Mr. Cole: I am confused, your Honor. My Instruction No. 3 is "Plaintiffs in their complaint," and then the second paragraph, "Plaintiffs claim," and the third paragraph, "Plaintiffs claim," and the fourth paragraph, "Plaintiffs claim."

The Court: Well, he is going beyond that, to the defendant—"Defendant denies."

Mr. Cole: I think there is no substance to the plaintiffs' objection. I surely think if we ever get into that, maybe we can strike all of plaintiffs' claims in the instructions.

The Court: Go ahead, Mr. Taylor, to your next objection.

Mr. Taylor: The next one, your Honor, is the second paragraph [360] of Instruction No. 6, that part which alleges that "plaintiffs are not entitled to recover for loss of profits unless you can determine with reasonable certainty the quantity of gold which was and would have been mined by the plaintiffs from the Eastern Star Mine over the term of this lease."

That much of it, your Honor, we feel that should be in that instruction, but the following sentence we believe is objectionable, your Honor, upon the

grounds that it is not a correct statement of the law, and we would ask that the next sentence, which reads as follows:

“Once you have determined the total value of the quantity of gold which was and would have been mined by the plaintiffs over the term of this lease, you must then deduct therefrom all rentals or royalties which under the lease were required to be paid to Mike Stepovich in the amount of one-third of the value of all gold which was and would have been mined over the term of this lease. You must also deduct from this value the costs of mining the gold which was and would be mined over the term of the lease, which costs include all the expenses of the operation of the mine and including as an element of such costs, the development and operational costs incurred by plaintiffs up to the time of their eviction.”

We feel, your Honor, in view of the two citations this morning directly to that point, that that does not correctly state [361] the law in regard to allowing for the amount that would have been taken out of the ground the cost of mining the same, and the Supreme Court case decided directly contrary to the Court's instructions.

The Court: That was a conversion case, Mr. Taylor, and I didn't consider it on all fours with this or as authority for this proposition.

Mr. Taylor: I believe it was in point, your Honor, and should have been considered by the Court.

The Court: Very well.

Mr. Taylor: O.K. Then, we pass on to Instruction No. 8.

“You are further instructed that the plaintiffs’ claim in the amount of \$6,791.29 for expenses in the development and operation of the mine up to the time of their alleged eviction is not as a matter of law recoverable against the defendant. These expenses are to be considered by you only as an element of costs in determining plaintiffs’ loss of profits as I have heretofore instructed you.”

We object and except to that, your Honor, upon the grounds that we feel it is not a correct statement of law. The Court errs in giving that instruction for the reason that a person, by the actions of the defendant, who unlawfully does an act to prevent him from going ahead with the mining of the property, cannot set up and get a credit on his damages of what the plaintiffs have expended on you might say dead work in developing and [362] placing the mine in a condition for operations.

That is also based upon one of the cases, your Honor, of the Supreme Court which we gave, and we feel that it should not be given. It is contrary to the law in this case.

That is all our exceptions, your Honor, to the instructions.

The Court: Very well, Mr. Taylor.

Mr. Cole?

Mr. Cole: Your Honor, the defendant has only one relatively minor objection. It occurs on the third page, the first sentence of which starts,

"Plaintiffs in their complaint claim." Going to the second paragraph, the first sentence of which reads:

"Plaintiffs claim that on the 21st day of August, 1942, Mike Stepovich, defendant's testator, wrongfully caused to be filed in this Court an action against the plaintiffs."

Then the next sentence is the one that the defendant objects to:

"At approximately the same time, Mike Stepovich wrongfully and unlawfully caused a writ of attachment to be issued \* \* \*", et cetera.

The Court: You mean it looked like a statement of fact?

Mr. Cole: Yes, sir.

The Court: I will correct it.

Mr. Taylor: If the Court please, I believe that reads properly, because the Circuit Court of Appeals has held that it [363] was a wrongful and unlawful detachment, your Honor.

I didn't follow the exact words of Mr. Cole's objection.

The Court: Mr. Cole's objection is: he said it was minor, that it looks like a finding of fact by the Court, rather than a claim of the plaintiffs.

That is your objection, isn't it?

Mr. Cole: Yes, your Honor. If you just put a comma after the words "plaintiffs" against the preceding sentence, "and that at approximately \* \* \*" that would cure that.

Mr. Taylor: That is all right. We would have no objection to that change, your Honor.

The Court: Very well. I am going to make the change with pen and ink; I am putting a comma after "plaintiffs" and making it read: "and that at \* \* \*"

Mr. Taylor: "Approximately."

The Court: Very well.

How much time do you want, Mr. Taylor, for argument?

Mr. Taylor: Your Honor, I must say, in view of the length of time it has taken to try this case and the number of exhibits of the plaintiffs has just about exhausted the alphabet, and many of them are very important, some of them are minor, and I will pass over very briefly, but I think in view of the importance of the case, your Honor, I would want not less than one hour.

The Court: Yes. I don't know a time when I have stopped any counsel from arguing, but I would like to have some gauge. [364]

Mr. Taylor: I might say, your Honor, it is possible that even putting that limitation on us, that we might want to ask for a few moments more in the event that we need it, but if the Court wanted to know just approximately, that is it.

The Court: That is what I wanted. Are you ready to proceed?

Mr. Cole: May I make one suggestion? This juror's chair (referring to alternate juror), perhaps it would be a little more convenient for counsel if it now were placed over there (indicating).

The Court: I think it is a little awkward there.

I wonder if the reporter's table could be moved a little and the juror's chair placed there.

Mr. Taylor, what do you think of that seating arrangement?

Mr. Taylor: I think that would be all right, your Honor.

The Court: Very well, the jury will please come in.

(Thereupon the jury was brought into the courtroom and resumed their places in the jury box.)

The Court: Do the parties wish the roll call?

Mr. Cole: The defendant waives it, your Honor.

Mr. Taylor: We will stipulate they are all present, your Honor.

The Court: Very well, you may proceed, Mr. Taylor.

#### Argument To The Jury By Mr. Taylor

Mr. Taylor: If the Court please, Mr. Cole, and ladies and gentlemen of the jury: After several arduous days in the courtroom, [365] we have now arrived at the time where the burden is going to be placed upon this jury and soon you are going to retire to the jury room and take into consideration the evidence that has been adduced from the witnesses and also from the exhibits that have been introduced into evidence, and also the Court's instructions of law which will be given to you at the conclusion of the arguments of this case.

I might say, starting, that this case has been going on a long time. The matters set forth in the

complaint occurred in 1942, between the 13th day of February, 1942, and the 22nd day of August, 1942, and that the original complaint filed in this case I believe was in 1945, and was tried in 1948 and went to the Circuit Court and back again.

Due to the Court's congested calender and the disqualification of certain judges, we were just now able to get this to trial, and I think by that long length of time that perhaps sometimes witnesses' memories have become a little bit blurred. I know mine would be, possibly some of the jury's would be, and that possibly the testimony as given, there might be some variations, but if there were no variations I would be very suspicious and skeptical as to their testimony, because I don't believe that if two persons or any person, for that matter, that gave some testimony nine years ago, that they can repeat it word for word or recall the instances recounted nine years later, that they are going to recall, because in the meantime [366] certain thoughts and images went through the mind that might have left a picture that might be just a little bit different than it was before. Time makes a great deal of difference.

Then there is only one other observation I wanted to make in this matter, and that is as a result of quite a number of years of experience, of over thirty years of experience, that this case exhibits, I think, to the jury and I know it is to me, one of the most flagrant cases of avarice and greed that has ever been brought to my attention. A total disregard for the rights of fellowmen. Very sel-



dom do you ever see men brought into a conflict such as the plaintiffs were in this case and subjected to the treatment that they were when they had gotten to the point after many arduous months of work and were on the point of realizing a good return from that work, when they were deprived of the fruits of their toil by a malicious and willful and wrongful act on the part of the defendant in having those men thrown off of the ground and could not come back.

I have tried to show in this matter that on the, and no doubt you are familiar with this, that this lease was executed on the 13th day of February, 1942, and evidently there was haste to get upon the ground on the part of Mr. Stepovich because he testified they must be on the ground within ten days after the execution of the lease.

We know that at the start of this operation there were three plaintiffs, Mr. Zukoev, Mr. Kupoff, and Mr. Drazenovich. [367] Mr. Zukoev and Mr. Kupoff were both miners and had been following that occupation for a good many years, both placer mining and quartz mining. Now, Mr. Zukoev had worked on the Eastern Star mine before. He knew the value therein, and Mike Stepovich also knew the values therein, and for that reason the royalty of  $33\frac{1}{3}$  per cent of the production of the mine was agreed upon as a fair royalty.

Now, there were other things in here, certain matters, one especially that you will have to bear in mind, was the fact that under paragraph four there was a 22 caterpillar tractor went with the

lease, but there was an additional compensation for leasing that cat, and \$250 was to be paid in July, 1942 and then the other \$250 on September 1, 1942. That is important to bear in mind, the fact that this caterpillar tractor was leased, was mentioned in this lease, and for the remuneration of the rental of \$500 for the full term of the lease.

Now, following the execution of this lease, the three partners, mining partners then contributed to the venture the sum of \$250 apiece, and then they went around, they were buying tools, they were buying mine rails, they were buying groceries, and other necessary articles with which to equip the camp on the Eastern Star placer claim, located about thirty miles from Fairbanks and on which they had this lease for that period that we have specified, February 13, 1942, to November 1, 1943, about a year and a half—a little over. [368]

They were required under the terms of the lease to be on the property in ten days. So on the 22nd day of February, 1942, they did go to—that is, as far as they could get by motor vehicle, Fairbanks Creek, and then they mushed in over the snow to their camp, a distance of about three miles in mid-winter, that was in February of 1942, and then in about a day they got a cat going that was there, and they came out, dozed a road out a bit, and then moved the rest of their stuff in, and immediately got the machinery in operation and began their work to put the mine into such shape that they could continue their drifting to the point at which they expected to find gold.

You have heard the description both by Mr. Kupoff and Mr. Zukoev as to the condition of this shaft, which was 93 feet deep and filled up with water and it was frozen, and the length of time it took for them, day after day working ten hours a day, to clean that up, and then when they got to the bottom of that shaft they went down one of the drifts and it had frozen, had a lot of ice in it, and quite a bit of the material, the walls, and the ceiling of the tunnel had caved in and that required cleaning out.

Now, they were hoisting this stuff up and were putting it on the dump, and as they drove on and on, they finally got to a point where they were approaching the proximity of where they felt that the pay streak was, but in the meantime the deceased, Mike Stepovich, told them about a drill hole which laid to the [369] right a certain place, if they would go over there they would find gold. Well, they did. They deviated from their course they were following and drove a drift over there and found out that the report was untrue, so they came back to their main drift and went back a little ways and drove across kind of in a north-westerly direction, and finally they came to the zone or a formation which for brevity we will call either the pay streak or the golden zone. They knew that this golden zone or this pay streak was in that proximity and they hit it.

Now, we have the exhibit here, which shows you much better than I can say it, what these men were up against. There was the shaft (indicating),

and there was a point, but this drift had been drilled or had been driven, also out to here (indicating). So when you take this sketch, which is given to you for the purpose of illustration, these broken lines as explained at the time that Mr. Zukoev testified, are drifts which were not used and which these plaintiffs had nothing to do with, and even down here (indicating), about 70 feet, but there, from there on (indicating) this drift was driven to a point here (indicating). Then they came this way at the behest of Mr. Stepovich, but found nothing, and they came back and drove across here (indicating) and there is where they hit what we will call the golden zone.

There were other interferences in the prosecution of this work. Mr. Stepovich tried to cause them to cease the work [370] because he said that they had gone beyond the exterior boundaries of the claim.

Mr. Cole: Your Honor, I am going to object to Mr. Taylor's continually making statements of evidence which there is no evidence in the record to sustain.

The Court: The jury, of course, will disregard any statement of counsel unless it is borne out by the evidence.

Mr. Taylor: And that they had gone beyond the exterior limits and so he had a surveyor come down there, and this surveyor surveyed it and found they were within the boundaries of the claim.

Now, I am going to revert back to the beginning a little bit. Now there were these three partners.

In this book you will find that very nearly from the first of this operation that these partners had hired men, all the time from the date that they went out there to the date that they quit, they had from two to five men employed. And you can take from a computation of these two exhibits and see what those men were paid, how the distribution was, the taxes, the time, and the overtime, and how much was actually paid to these men as compensation.

Now, you will find that during this operation from February 22nd until the 22nd of August, as I said, they worked, from two to five men working for these partners. It will also show that the partners also changed. There was a change in partners. [371]

This partnership actually lasted, that is, the operation lasted 182 days. These books will show that some of these men did work that long. We will also show that Mr. Kupoff and Mr. Zukoev both worked the entire time. We will also show that according to a relinquishment of his interest in the property, that Mr. Drazenovich worked 160 days. We will show that Mr. Kitoff took an interest in the partnership and was there, I believe, 46 days, and Mr. Kabak was a partner for 44 days.

There was an agreement that the partners would receive ten dollars per day for their work. Also the testimony of Mr. Kupoff shows that from the 22nd day of February to the 22nd day of August, 1942, not one day was lost; that they worked ten hours each day of that period, no holidays, no

Sundays, and the time book will carry that out.

Now, ten hours doesn't seem like a long time, but when you go for 182 days, as Mr. Kupoff and Mr. Zukoev did, they are not working out in the sunshine. They are not working out where there is air and light. They are down in the bowels of the earth, in the dark, in the dampness, digging into the face of the frozen muck, with the wavering light of a miner's lamp, and that is day after day, and day after day, driving forward, in the expectancy of reaching this golden zone, and they did reach it. And you have heard the testimony of these witnesses as they advanced day by day, cleaning out these drifts that had been there, and when they got in further, of driving on through [372] a little bit at a time, dragging their hoses behind them, driving the points into the frozen ground, then removing it, laboriously shoveling it into the mine cars and pushing the mine cars out to the shaft, hoisting it up and dumping it.

That is work, hard work, and in addition to that they had these men who are shown on this book here (indicating), they likewise were working day after day and day after day, ten hours a day. You can see the days that they worked, the distribution of the regular time and the distribution of the overtime, and the hours that they did work.

There were a lot of other things in that, too. There were matters of the food, and they purchased that. They had a cook out there part of the time. Part of the time they did their own cooking. And they were spurred on by the fact that they ex-

pected that that time and effort was going to be productive of results, good results, and we have here an exhibit that showed the money they paid out. They stated there were more checks than they show by the check stubs. So you can check those and see that as they went along they were paying upon their bills.

Now, also, you heard the testimony of Mr. Zukoev and Mr. Kupoff, testimony as they were going ahead they were constantly panning, panning, panning. Panning is the result of practically every discovery of gold in Alaska, and those men get very good at panning, and with all your mechanical devices of drilling and all of that, what does it finally boil down to? [373] You heard the expert here on the stand yesterday. They have their rotary drills and they go down and down and down. They take out a core. They go on down. How did they arrive at what the values are down there? Just as Mr. Colp says, "We panned what we got out of that hole." The pan, actually, tells you everything. No matter what drills you have, it is the little old gold pan, you get it down there in the water and you agitate it and gyrate it and get a little line of gold out in the edge.

So there are your experts. They come down to the pan. They are the ones that used the pan as being the final result, to find out how much gold there was. So the pan is what counts, and these men get very good at it. They can tell to a few cents or a few dollars.

Now, we are back down in the golden zone, and

what have we got? We have got pans of fifty cents, seventy-five cents, a dollar, a dollar and a half. Wonderful, wonderful ground. And those figures were not based upon taking a shovelful of dirt from down at the bottom of the bedrock where the heaviest concentration of gold, but they went up to a point six feet high and chipped out of that frozen muck the gravel clear on down. They caught that in the pan, and then they rotated it and gyrated it, took out the rocks and the dirt and stuff, and finally when they got down to the black sand, finally they whirled that out, and they got their gold in there. And they can tell by looking at it how much. You can't fool them. [374]

Now, here these boys, they panned that. They felt that "we have hit it."

As Mr. Zukoev testified, they drove across here (indicating), and about where that line is is where they hit the pay streak (indicating). To ascertain as to the extent of that body of high-grade gravel, they then drifted up this way and they drifted down this way thirty feet in each direction. So then they had a face on this pay streak 60 feet wide and they panned all along that 60 feet, and it was uniform. It was fifty and seventy-five and a dollar and a dollar and a quarter and a dollar and a half a pan. They knew then they had struck it. So then they then bring their steam pipes in. They bring their hoist, their hoses, and their points in, and then they started to drive. They drive these holes in and then they put these steam lines in there and let them stay for ten hours. I think Mr. Zukoev said he was



the head of the underground operations, and in time that would thaw out to a depth of 12 feet. So then when that was thawed, they withdrew those points, and then they started again the laborious work of shoveling this thawed ground and gravel with its gold content into the mine car, down through the dark and out into the shaft and up above where they immediately started washing that. They would dump that in the hopper and wash as much as they could of that, and then they knew that that was rich dirt, and in the evenings they would work and also [375] wash more.

There is no dispute as to those matters. So now let us see what was in that area. They tested. They took out a 60-foot width, or length here, 12 feet deep, and that they removed all that and took that out, and they took it out six feet high. It only takes a little calculation to do that. Here is six times sixty times twelve, that is 4,320 cubic feet. That is 170 yards.

Now, the testimony here is that—let's take the lowest figure, the lowest pan. You are at liberty to say that that averaged more than that. But let us take fifty cents a pan. There are seven pans to the cubic foot, so if we take the seven pans, that would be, at the lowest panning value, \$3.50 per cubic foot, and 27 cubic feet to the yard would be \$94.50 a yard. Or let's leave it in cubic feet, 4,300, 4,300 and 20 cubic feet, well, multiply that by \$3.50, and what have you got? How much was taken out of that one area? So we take 4,320 cubic feet and multiply that by \$3.50. Let's see what we get. \$15,120

out of that block of material, block of gold-bearing gravels and dirt that was taken out of the six feet by 60 feet by 12 feet deep.

That is not an extravagant mining ground in Alaska. There have been lots of them richer than that. So there is \$15,120 which they took out. [376]

Now, the testimony of Mr. Zukoev, I believe it was, he testified that as they went in further into the golden zone the values got better, and then they put in another line of hose and points and were thawing another 12 feet when they were very rudely interrupted in their operations by the arrival of a Deputy Marshal at the scene of the operation, and they were taken out of there. The mine was on an operating basis and was producing, and this marshal came out there and served upon them a summons, and evidently they served a complaint on them, and the complaint and summons—the summons, and also they served upon them a writ of attachment. The District Court in this case said, this is the case of Mike Stepovich v. James Zukoev, Paul Drazenovich, Nick Kupoff, Mike Kitoff, and Nick Kabak, and this is command of the Marshal:

“That you attach and safely keep all the property of the said defendants not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff’s demand, as above stated, to be found in your Division of said District \* \* \*.”

The demand says:

“Whereas, Mike Stepovich, plaintiff, hath complained that defendants are justly indebted to plaintiff to the amount of Three Thousand Fifty-one

Dollars and nine cents and the necessary affidavit and undertaking herein having [377] been filed as required by law.”

Also a summons for them to appear in court and answer his complaint that was based upon his first cause of action for \$2,700 plus interest thereon at eight percent from April 15, 1942, and also there were four other causes of action in there.

The reason I call your attention to this caterpillar tractor that was mentioned in the lease, I would like to call your attention to this complaint. This is the complaint of Mike Stepovich against these defendants. He said, “That at their special interest and request,” “they” being the plaintiffs in this case, “plaintiff rented to defendants one RD-7 Caterpillar with bulldozer attachments and sleighs from the 20th day of February, 1942, to the 15th day of April, 1942, a total of 54 days, at an agreed rental of \$50.00 per day, making a total of \$2,700.00.”

Maybe you remember Mr. Kupoff’s testimony here, that that caterpillar was there, is was used at one time to do some work for Mr. Stepovich, and also he did a little bit of work for himself, a couple of days, but that was with Mr. Stepovich’s permission. But a few days later Mr. Stepovich leased that caterpillar tractor to the Cleary Hills Mining Company, and it wasn’t on the ground any other time that these people were there. But he goes ahead and on oath swore that he had rented this caterpillar to these defendants. [378]

He also in here says he wants \$2,700 for a cater-

pillar that was being operated by the Cleary Hill Mining Company, a company operating a long ways from there.

Now he also says that these boys were indebted to Shermer and Lawrence Reed, co-partners doing business as the Pioneer Express, in the sum of \$133.50. He said the indebtedness had been assigned to them. No assignment was shown here.

And then he finds out that these boys owed Independent Lumber Company. That was Ferguson and Rutherford, \$18.60. He finds that out and he puts that in. And also there is Mr. Barrack, who was the owner of the Samson Hardware. He finds out they owe him \$11. You will see, if you leaf through these, you will see checks made out to Mr. Barrack, you will see checks made out to the Sourdough Express, you will see checks made out to the N. C. Company, and then mentioning the N. C. Company, brings to my mind that the last count of the complaint states that he was indebted to the N. C. Company in the sum of \$187.99, and that they had assigned the debt to him, but isn't it odd that they would assign the debt to him? Why did Mr. Kupoff for over a year after they ceased operations out there receive bills monthly from the N. C. Company for \$187.99?

That was nothing but a pack of lies, the whole thing. It was a malicious thing. It was an unlawful abuse of the processes [379] of this Court. The Court is supposed to protect us in our every-day lives, and it was used as a means of oppression. It was a dastardly thing to do to these men. This thing was on the 21st day of August, 1942.

Now, there is another thing that happened. Now here we will prove this was a deliberate fraud, a fraud upon the courts, a fraud upon humanity, because here on the 8th day of August, thirteen days before the complaint was filed, there had been a full settlement of the account between these men who were working in the mine and Mr. Stepovich, and it reads as follows:

“To: North Star Mining Company, Dr.

Fairbanks, Alaska

to Mike Stepovich, Cr.

|   |           |
|---|-----------|
| “Back royalty due on all cleanups<br>prior to Aug. 2, 1942.....   | \$ 145.92 |
| Wood—3 cords @ \$10.00: 8 cords @<br>\$6.00; and 6 cords @ \$5.50.....  | 111.00    |
| Caterpillar rent under lease * July<br>payment .....  | 250.00    |
| Groceries as per inventory.....   | 43.03     |
| Royalties on August 2, 1942, cleanup<br>—based on \$27.00 per ounce — 48<br>ounces (331/3% of \$1296.00)..... | 432.00    |
| Caterpillar parts .....   | 45.65     |
| Waechter Brothers Company bill paid<br>by Mike Stepovich.....   | 138.34    |
| A total of [380].....   | 1,165.94. |

“August 8, 1942—Paid in full, as follows:

|   |            |
|---|------------|
| Cash .....  | \$1,120.29 |
| Offset by services rendered moving<br>light plant and supplies to home... | 45.65      |

and that making a balance due to Mr.

Stepovich of ..... \$1,165.94,

which was paid and signed by Mike Stepovich, himself, thirteen days before he filed this suit and went in and took these fellows' belongings. All they had was the clothes on their backs and their blankets.

He went further than the law allowed, and took the food. Didn't leave them a bite of food. They took their oil and their fuel. They couldn't burn a stick of the wood they had there.

Now, is that the humanity that one person should show to another?

Now, I think we can conclude from this that this was a deliberate attempt, an illegal, unwarranted attempt, for Mike Stepovich, who had been in the drift up there panning and panning and panning, and it was only when he found out that they had hit the golden zone did he do this, and he did it for the purpose of depriving them of the fruits of their toil, that he would get that gold. He would get it. He would drive them out of there. Five and a half months of slavery for Mike Stepovich, because they worked for nothing. You can take that into consideration in arriving at your verdict. [381]

Now, they waited and they waited and they postponed this trial, and finally the attorneys for the North Star Mining Company, for Mr. Kupoff and Mr. Zukoev, wanted to get it up for trial so that they could go back into the mine, so that they could show that this was a fraud upon the world and a fraud upon the court, maliciously instituted and maliciously carried out. And in here Mr. Collins, who was the attorney for Mr. Stepovich, moved for a continuance of the trial. Mr. Hurley resisted the

motion. This is Plaintiffs' Exhibit O. And the court then denied the motion for a continuance. They couldn't postpone it any more. They had to bring it for trial. Did they have the intestinal fortitude then to go into court and commit perjury? They certainly did not, because right then and there, at that moment, Mr. Collins got up and moved for a voluntary non-suit. They dismissed their own case because they knew it was a bogus case. And you can take that into consideration, too.

Now, you can look these checks over. You will see those checks payable to the Sourdough Express, to the N. C. Company, and everybody else. You can total them up if you want to.

Now, I have here one document I think — now, this is quite an important document in this case, and this is Plaintiffs' Exhibit Q. It is the original of the writ of attachment that was issued to the Marshal to go out and take all their belongings. [382] Now, there is a legal limitation to what can be taken but in this case it far exceeded the legal limits, because the Marshal made this return to that writ, and this was in the District Court for the Territory of Alaska:

Mike Stepovich, plaintiff, versus James Zukoev, Paul Drazenovich, Nick Kupoff, and the rest of them, doing business under the firm name and style of North Star Mining Company.

“Marshal's Return on Attachment.

“I, Stanley J. Nichols, United States Marshal for the Territory of Alaska, Fourth Division, successor

in office to J. A. McDonald, Former United States Marshal, do hereby certify that I received the hereto attached Original Writ of Attachment, at Fairbanks, Alaska, on the 21st day of August, 1942, and that thereafter on the 22nd day of August, 1942, I duly executed the said Writ at Fish Creek, Alaska, by taking into my possession the following described personal property, to wit:

“The dump and contents of the sluice boxes; merchandise and groceries in mess house; gasoline, grease and fuel oil, cord wood and timbers, used in connection with such mining operations, and (this is important)

upon order of the plaintiff's attorney, E. B. [383] Collins, instructed the miners engaged in said mining operations to leave the premises, and by authority of the plaintiff, permission was given to use the cat and battery charger to remove their personal belongings from the premises, and to return the cat to where it was when they were through with it. At which time and place, I appointed Emil S. Ryland as custodian, at the rate of \$8.00 per day.

“No physical inventory was taken of said personal property appears from the records in this office. The writ is herewith returned. That thereafter on the 15th day of September, 1942, upon written request of the plaintiff, the custodian was released as of September 14, 1942.

(signed) Stanley J. Nichols,

U. S. Marshal,

By: John J. Buckley,

Chief Deputy Marshal.”



Mr. Stepovich and his attorney stripped them down to their blankets, and just to be sure that they would not return we will call your attention to Plaintiffs' Exhibit R, of which there are four parts.

“Public Notice of Attachment

“Office of the Marshal of the United States

4th Division, District of Alaska [384]

“August 22, 1942

“This cord wood and timbers having been attached by me and now being in my possession by virtue of a Writ of Attachment \* \* \* Notice is hereby given that any person removing or attempting to remove said cord wood or timber without my written permission, or in any way interfering with said cord wood and timbers or my duly authorized Deputy or Keeper in charge thereof, will be prosecuted to the extent of the law.”

They were going to fall back and have the law protect them, in keeping these men out.

The next and the formal parts of it are the same as the other, but this was directed to the gasoline, fuel oil, and grease, and that likewise was attached. And the next one, the merchandise and groceries in this mess house. They took their groceries in the mess house. And the next one, the dump and the contents of the sluice boxes.

Now, it wasn't until November 24th that that matter was released, and what had happened between August 22nd and November 24th? Winter had set in. That shaft had filled up with water. The

drifts had filled up with water. They had frozen.

Maybe Counsel will say, well, they didn't go back to the place. How could they go back to the place? Their food had been taken, never returned to them. The tools had been taken, [385] never had been returned to them. The stuff down in the shaft and in the mine was down there under water, had flooded, and had frozen in, and if they went back onto the property then it would have taken them just the length of time to get up to the pay streak again as it took to get down there in the first instance, which was better than five months—about five and a half months. Because it was not until after the first of August of 1942, in fact, it was around the 8th of August, 1942, that they got into the paystreak, into the golden zone, into that part of the mine which was the culmination of all those five and one-half months of work. They were working down in the drifts, in the dark, with a little miner's light ten hours a day, and then in the evening they put the gravel through the sluice box.

Now, I have a little sketch. It is a perspective sketch, looking down on what is going on inside of such a mine. You heard the testimony over here that it is 93 feet down to the floor of that shaft, and this, as we say, we disregard that drift, we disregard that, because they were there and there was nothing in there (indicating). So they came around about here (indicating), and they drove this in here, and they drove over to here (indicating), but this is wrong, because Mr. Zukoev said they came back and drove over here (indicating), but if we

transpose this over here (indicating) it will be the same thing. [386]

And that, ladies and gentlemen, is where they took out that block of gold-bearing material in there, six feet deep, sixty feet long, and twelve feet wide, and had put another line of hose for another 12-foot thaw. And out of that, taking the lowest computations on the panning which they had taken would amount to \$15,120. And the pay was getting better. And also you can also, from the testimony that has been given here, say that this was taken out here (indicating). Now, the pans were just as good when they took out that first six by twelve at both ends and at the back of it as it was there. So you can take into consideration that another block of gold-bearing material in there that was thawed, during the process of thawing, would be equally as rich as that which we can conservatively estimate to be \$15,200. In fact, you can take more than that if you want to, because that was the minimum, because the pans were 75 cents and a dollar, and so forth. That is good dirt. That is the rainbow, if you can say that a rainbow, that you crawl along these drifts for 5½ months. It might be that it would look like a rainbow when you see it.

It actually turned out that these men were slaves for Mike Stepovich from the 22nd day of February to the 22nd day of August, 1942, but what did they get? What did they get out of it?

They got nothing.

You can also, ladies and gentlemen of the jury, from the [387] testimony of the experts, you can

conclude that, as one of the experts said, I forget whether it was Mr. Mathews or Mr. Colp, that with a showing like that, that there would be a zone of influence, and he drew a big circle up there, that there was a reasonable expectation that that pay would permeate that zone of influence, because it is a certainty that there would not be a line like that and another sharp line that way and another one that way, and they say, "This is all." Because it wouldn't be. You would know that it is just reasonable to believe from that testimony and from the fact of the size that was taken out, and there was no change in the values, that you can estimate that that pay streak was continuing.

We know we had over \$30,000 in this gold-bearing material right there, thawed, but some of it had not been taken out. Why did Mike Stepovich want to get these men away from there? Because he wanted to wash that gravel through the sluice boxes. He was the one that wanted to take advantage of all the thousands of dollars that these men had spent in supplies and in wages and in work, in virtual slavery, ten hours a day, seven days a week, thirty-one days a month, and those men had no Fourth of July, no Sunday, no holiday, and then Mr. Stepovich invokes the power and majesty of our law, by perjury and fraud and malice, to wrest from these men that to which they were lawfully entitled, and he made them walk away from there, folks, with just their blankets. [388]

I don't know what Mr. Cole is going to say. Perhaps he will tell you that poor Mike Stepovich was

certainly set upon by these men; that they were just robbing him.

Now, Mrs. Stepovich testified up here that Mike said one time that he was suspicious that somebody was taking gold out of the sluice boxes. Who is the person that is usually suspicious of other people being a thief? It's a thief that is always suspicious of somebody else. I think you can bear that in mind.

You can bring in a verdict, ladies and gentlemen of this jury, of between \$30,000 and \$50,000 or \$100,000, but if you bring in a verdict for \$100,000 you are not nearly repaying these men for the indignities and the suffering that has been inflicted upon them and which they have been trying to collect for fifteen years.

They believe in their cause being right, and that is why they are here. They are just working men. We hope that you will take those matters into consideration when you retire to the jury room and bring in your verdict.

The Court: Members of the jury, please heed the admonition I have given to you so many times, and we will take a ten-minute recess.

Clerk of Court: Court is recessed for ten minutes. [389]

(Thereupon a ten-minute recess was taken.)

Clerk of Court: Court is reconvened.

The Court: Do you folks wish the roll call of the jury?

Mr. Taylor: We will stipulate the jurors are all present, Your Honor, including the alternate.

Mr. Cole: We will waive the polling of the jury, Your Honor.

The Court: Very well, you may proceed.

(Thereupon Mr. Cole presented argument to the jury on behalf of the defendant.)

Mr. Taylor: Would the Court like to take the recess before I proceed?

The Court: Would you prefer it, Mr. Taylor?

Mr. Taylor: Yes.

The Court: Very well. Members of the jury, please heed the admonition I have previously given to you. We will take a ten-minute recess.

Clerk of Court: Court is at recess for ten minutes.

(Thereupon a ten-minute recess was taken.)

Clerk of Court: Court is reconvened.

The Court: Do the parties waive the roll call of the jury?

Mr. Cole: Yes, Your Honor.

Mr. Taylor: Yes, Your Honor.

The Court: Very well. Do you suppose, Mr. Taylor, you can limit your rebuttal to half an hour?

Mr. Taylor: Yes, Your Honor. I am going to touch briefly only upon some of the remarks of Mr. Cole.

First, if the Court please, Mr. Cole, and ladies and gentlemen of the jury: I want to congratulate Mr. Cole upon his masterly misinterpretation of the evidence. It was a good job so far as it went. Mr. Cole is doing what he was supposed to do, to take this evidence of the plaintiffs and try to put it in the worst possible light. He has got to play Mr.

Stepovich up as a great benefactor of humanity, a man who was looking out for the welfare of his fellowman, and he has done a fairly good job. And with tears in his voice he has called your attention to this poor lady who has had this lawsuit hanging over her for fifteen years, but what about these poor men, working men? They have had it hanging over them for fifteen years. They were the men who were virtually slaves to Mike Stepovich for possibly six months. They were the ones who were cooped up in the underground workings of the mine and received nothing for it.

Now, they said there was nothing in the sluice boxes nor there was nothing in the dump, but I read one of the exhibits here, an attachment notice, placed on the gin pole. They attached the dump and the contents of the sluice boxes. There was no value there, though, but they sure attached it.

Now, another evidence of the value of the mine is the fact that the F. E. Company, the United States Smelting, Refining and [391] Mining Company, which I don't believe ever out of sympathy buy a mine or buy any property, has the Eastern Star Mine under a 50-year lease, and Mrs. Stepovich is the beneficiary of that lease. Mrs. Stepovich is living off of some of the earnings that came from Mr. Kupoff and Mr. Zukoev and their fellow partners.

I think one of the greatest arguments as to the value of that mine is that the F. E. Company in 1942, in the fall of 1942, while these plaintiffs still had the lease on it, the lease hadn't been canceled,

leased that to the United States Smelting and Refining Company for fifty years. You have never seen that company buy a pig in a poke. When they took that claim on a 50-year lease, you can bet that there was surely something in it.

Now, I made some strong statements, yes, I did. I will admit to Mr. Cole that I made them, but they were called for. Any man that would do the despicable things that Mike Stepovich did to these men deserves strong statements.

I am surprised that Mr. Cole threw out his heart on this thing. These men were mining. How were they mining? When they went there, what did they find? A shaft 93 feet deep, and they were cleaning that out, which took a month. Was that mining? When they were cleaning out the old drifts was that mining? And when they were going through that part of the underground workings where there was very little gold, if any, that wasn't mining. That was development work, and [392] the mere fact that they were spending money doesn't mean they were operating at a loss. They did, incidentally, put some of that dirt through the sluice box after they got in there, but you want to remember for about four months everything that they hoisted out of that mine was piled in these dumps that Mr. Colp and Mr. Mathews sampled. It was waste material, because they never sluiced until June, and they were hoisting out of there and dumping. That was the only place they could dump it. They couldn't haul it away. They dumped it on each side of there.



When they got to the rich area, what did they do then? They concentrated on washing that, because they knew that that was rich dirt. So that went through, and it left the dump which consisted only of that stuff which had been taken out on their development work. They did get some money out of that. Some of it they got \$3,500. That was incidental to the development, and you couldn't call that engaging in mining, as much as you could say that if somebody was building a factory and every day they spent a lot of money but nothing coming in, that the company was losing money because they were building a factory or a building. It was developing, and just what these people were doing.

Now here (indicating), you see this dump is about, I would say, five feet high here. Something has been taken out of the [393] center of it. This is from one side. But we also want to show you that there was a dump there in 1941. Mr. Cole doesn't tell you that. That was there in 1941. And this was there in 1957. And another thing, Mr. Mathews says there are two generations of workings there. Where did the second generation come from? We do know that Mr. Zukoev, who was running the hoist, he did dump what was brought up during the development work for three or four months, he had to pile it some place, and he piled it there, and Mr. Cole sent Mr. Mathews out to get samples of that dirt. They could expect they would get very little, if any, values out there. But Mr. Kupoff said when they got into the rich dirt they were feeding that into

the hopper and into the sluice boxes, because they said they wanted to get as much money out of that particular thing as early as they possibly could.

Now, another thing, Mr. Cole made something out of what Mrs. Stepovich said. She said Mike said he thought somebody was stealing gold. Didn't say who. I asked her who she thought it was, and she didn't know.

As I said before, the suspicious person is the person that usually is the thief, but Mr. Stepovich was present at every clean-up, and he is the man that took clean-up into town and put them in the bank, and one of them he didn't bring to the bank either. They had to get a lawyer to get that [394] \$1200 clean-up away from him.

Now, Mr. Cole laments the facts that we sued the estate. Fine and dandy for Mike Stepovich to perjure himself and make a complaint against these fellows, but don't sue this estate. It is a terrible thing to sue Mrs. Stepovich. She is down to her last yacht, her last Cadillac. But we know she is not down to her last revenue in producing buildings.

One time Mike Stepovich says they owed him some royalty. They did. They billed these boys for royalty. They were paid on the 8th day of August, 1942. Everything was settled between Mike Stepovich and these partners. But immediately after that, when they strike this rich pay, that is when Mike Stepovich said, "They are not going to get that. I am going to have it." And that is when he started this, because was on the 21st day of August.

Now, who stands to gain the most by winning this lawsuit? Mr. Stepovich, or not Mr. Stepovich, but Mr. Kupoff and Mr. Zukoev, they will gain something, but Mrs. Stepovich, if she wins, she is the big winner. She is the big winner. I think that she was truthful. I don't think she told an untruth in there. She told you that her husband said that he thought somebody was stealing gold, but he didn't say these men, and he had several outfits on the property.

Now, Mr. Cole has stressed the fact about these expenses [395] and about the losses they had. Now, some of this expense can be directly attributable to Mr. Stepovich at the time he had them turn to the right to keep them from going towards this pay streak, and they went over there forty-some feet, drifting, and went over there and found nothing, came back, and then went the other way.

Now, I wanted to call your attention to something. I was going to put on here that we had an area, a block of gold-bearing dirt, which was six feet deep by 12 feet in depth by 60 feet in length. That equals 4,320 cubic feet. Now, then, we had seven pans to one cubic foot, at fifty cents, which was the lowest pan, that would be \$3.50 per cubic foot, or \$94.50 per cubic yard, and that would be, then, \$15,120 in that particular area that they took out. If they had been allowed to take out the other thaw they got, they would have had twice that much, or \$30,240. That is proven value. It is proven by the same way that the mining engineers say they prove things, by the pan, because they came in

here, three of them came in here and told us they panned. That is what these experienced miners did. They panned and they got that.

Now, that would be that much if you only take fifty cents a pan, but if you take seventy-five cents a pan it would be fifty percent more. So then if we took the two thaws, if you allowed them the two thaws, you would have this amount for [396] the two thaws at fifty cents, and you can work it on up, and you can take into consideration whether or not this went that much.

If it was 75 cents, it would be \$46,060, and if it was one dollar a pan—I will put 75 cents here—one dollar a pan, would be \$60,480. That would be a conservative estimate of what that would be, and double if you allow for both thaws, and that is what we feel that you should bring in a verdict for.

Another thing, as I stated before, you can take into consideration, that after that mass unit of sixty foot by six foot by twelve foot was taken out, that the ground adjacent to where is was taken out showed better values than what was taken, so you have the right to conclude that that value continued, not only into the pay streak, but at both ends, or as the mining engineer said, there would be an area of influence in which you could expect to get gold of approximately the same richness as that.

Now, as far as Paul Drazenovich is concerned, Mr. Cole would have you believe that Mr. Drazenovich sold out after they hit the pay streak, but you remember Paul Drazenovich sold out before they had the reckoning and the man paid him the

eleven hundred and some dollars and they hadn't hit the pay streak, then. Paul Drazenovich, if he were here, he might tell you another story. He might tell you a story of threats and a gun [397] and things that way, but I don't know where Paul Drazenovich is.

And if Jimmy Zukoev was here right now, he could tell you that he is sick and he went to the doctor yesterday at the conclusion when he got through here. Jimmy is not indifferent to this, but Jimmy was a sick man when he was here all the time.

Also, I think I mentioned this to you, that although the engineers tell you that all these values were arrived at by drilling, how they could tell the extent of the mass of this pay, but after all they finally decided, Mr. Colp did, to pan what comes up from the drill, and I have no doubt but what Mr. Zukoev or Mr. Kupoff are possibly two as good panners as there are in the Territory of Alaska. I know that they are as good as these mining engineers, because they don't do a great deal of panning. But that is their life.

Now, you have a right, from the evidence here, you can project into the future and from the values there you can make an estimate of what the boys would have taken out if they had been allowed to operate there, from the 22nd day of August until November the first of the following year. They could have worked in the winter. They could have gotten their dump out in the spring, and in the summer they could have run it through.

Now, Mr. Cole would have you believe that the only thing you can go by is what you actually see. But I believe it was [398] Mr. Beistline who said that lots of times the pay streaks will run for miles. We know that. There will be whole creeks for five miles, six miles long, pay from one end to the other, and these deposits underground were put there at one time by a creek, and if you can get the direction of that creek, the way it ran, when it deposited the gold there. that pay streak could run for many, many hundreds of yards.

He said they run for miles, and possibly we in our knowledge of conditions up here know of places where they run for miles.

You don't have to guess on this matter. You know what happened. You know that the boys were deprived of the fruits of their effort over a period of five or six months. Profit and loss—you can't figure a cost for those things that are not mined but which were there that could have been taken out, so you can place whatever value you want upon that gold, that gold-bearing material that was in that mine which they could have gotten out, as what you should bring in your verdict for, because you can't use as a yardstick that money that they expended, because that was all for dead work.

Incidentally, though, they did take in \$3,500, so you don't have to guess about that.

Of course, the big, strong point that Mr. Cole made is the fact that Mr. Colp and Mr. Mathews did pan the old dump that was taken out when they were cleaning up the tunnels and when they were

taking out through the lean part of the workings until [399] they got to the high grade, until they got to where, to what we call the golden zone, and from that time on they worked and they dumped into the hopper and ran that dirt through, because they knew that the values were there. Very little, if any, of that dirt, except maybe down near the sluice boxes, there might be a little bit of it, but I think this dump is more or less the same as it was, according to Mrs. Stepovich's picture, that was introduced as the appearance in 1941. An old dump. Both the engineers told you that. It is an old dump.

Why didn't the Stepovichs many years ago go out and pan that dump and see what it was. They wait fifteen years. This suit has been pending for ten years. Why didn't they produce this stuff instead of expecting to have you guess as to things?

You are not to guess about what has been testified to under oath by Mr. Zukoev and Mr. Kupoff, but they want you to guess that what they say about this is true, whereas the high-grade dirt was sent through the sluice box from the time it was discovered sometime a short time after August 8, 1942, and they put that through the sluice boxes until August 22nd, at which time they were stopped, and Mr. Stepovich, as I said before, was particularly anxious to attach the dump and the sluice boxes and the contents.

This case has not been any satisfaction to me. I have been in it a long time. I feel sorry for Mrs. Stepovich. Mike Stepovich, Junior, is a friend of mine. We have been friends for [400] a good many

years. It is those things that we have to do. I have tried to do the best I can for my clients. My clients have a justifiable cause. They were certainly to mildly put it, they were certainly put upon by Mr. Stepovich, and he took the efforts of ten hours a day for a period of six months of from five to nine men and then wiped out the fruits of their efforts with the signing of his name to a complaint which he didn't have the nerve to back up in Court, but when the property was put in such a state that they couldn't go back on and mine, then when the Court would not give a continuance of the case he took a voluntary non-suit, knowing they could not go back on until the following year.

Now, I hope that when you go out there that one of these figures will be what you bring in. It is a certainty that Mr. Zukoev and Mr. Kupoff who put so much into developing that property for Mr. Stepovich and put it in the shape so that it resulted in the United States Smelting and Refining Company taking the 50-year lease on it. You might say, "Why didn't we get the drillings here? Why did we not show those?" They had the drillings, but they would not bring them in. Why?

Mr. Cole: Your Honor, I object to that. It is clearly improper, and there is no evidence as to that.

The Court: Mr. Taylor, I think I will strike that statement and ask the jury to disregard it.

Mr. Cole: We don't have them. [401]

Mr. Taylor: But Mr. Stepovich called these boys



attention to certain drill holes that they should go for. That is in the evidence. How did he know that those drill holes were there? If he knew they were there, he could have produced the drill logs, but they say we are at fault because we didn't have them.

You have quite a duty, ladies and gentlemen. I do not envy you. A duty to yourself, a duty to the Government, a duty to the plaintiff, and a duty to the defendant. None of us are asking you to do the impossible. We are asking you to use the mature judgment necessary to decide these issues, and I believe that when you have deliberated and considered these matters and these exhibits and the testimony of the witnesses that you will bring in a verdict in favor of the amount that you think the plaintiffs are entitled to.

I thank you for your attention and I think we will feel happy when this matter is concluded.

Thank you.

(Whereupon the Court read the Instructions to the Jury.)

The Court: The Clerk will please qualify the bailiffs.

(Thereupon the bailiffs were qualified and sworn.)

The Court: The jury may retire for deliberations.

(Thereupon, at 5:20 p.m., October 17, 1957, jury, in charge of its sworn bailiffs, retired to enter upon its deliberations, and the alternate juror was excused.) [402]

The Court: Now, Mr. Taylor.

Mr. Taylor: I just wanted to renew our objections to the instructions as given which have heretofore been stated.

The Court: Very good.

(Whereupon Court was recessed at 5:20 p.m., October 17, 1957, and reconvened at 10:40 p.m., the same day, and the following proceedings were had:)

Clerk of Court: Court is reconvened.

The Court: The Clerk will call the roll of the jury.

(Whereupon the Clerk of Court called the roll of the jury.)

Clerk of Court: They are all present, Your Honor.

The Court: Members of the jury, have you reached a verdict?

The Foreman: We have, Your Honor.

The Court: Mr. Putman, you are the foreman. You may either declare the verdict or hand it to the Clerk for declaration.

(Thereupon the verdict was handed to the Clerk, who in turn handed it to the Court.)

The verdict was read by the Court.

The Court: Is this the verdict of each and every one of you?

The Jurors: It is.

The Court: Very well, the verdict will be received. [403]

Certificate

United States of America,  
Territory of Alaska—ss:

I, Esther M. Rasmussen, official court reporter for the aforementioned Court, do hereby certify that the foregoing pages, numbered 1 to 403, inclusive, constitute a full, true and accurate transcript of my original shorthand notes taken at the time of the oral proceedings had in open Court on October 14, 15, 16 and 17, 1957, in Cause No. 5395 Civil.

Dated at Fairbanks, Alaska, this 10th day of March, 1958.

/s/ ESTHER M. RAMUSSEN.

[Endorsed]: Filed March 11, 1958.

---

[Endorsed]. No. 15962. United States Court of Appeals for the Ninth Circuit. Vuka Radovich Stepovich, Executrix of the Estate of Mike Stepovich, Appellant, vs. Nick Kupoff, James Zukoev, Mike Kitoff and Nick Kabak, a partnership doing business under the firm name and style of North Star Mining Company, Appellees. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Fourth Judicial Division.

Filed: April 7, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals  
For the Ninth Circuit

VUKA RADOVICH STEPOVICH, Executrix of  
the Estate of Mike Stepovich, Deceased,  
Appellant.

vs.

NICK KUPOFF, JAMES ZUKOEV, MIKE KIT-  
OFF and NICK KABAK, a partnership doing  
business as North Star Mining Company,  
Appellees.

STATEMENT OF POINTS ON WHICH AP-  
PELLANT VUKA RADOVICH STEPO-  
VICH WILL RELY

1. The Verdict and Judgment are unsupported by the evidence because the testimony and exhibits offered and admitted into evidence at the trial were insufficient to show that appellees sustained damages in any amount, and further that such testimony and exhibits were insufficient to show that appellees sustained damages in the amount awarded by the jury.

2. The Trial Court erred in refusing to grant appellant's motion for a directed verdict on the ground that appellees failed to prove any loss of profits and failed to present sufficient evidence to entitle the case to go to the jury.

3. The Trial Court erred in refusing to admit as evidence certain ore samples taken by witnesses for appellant.

4. The Trial Court erred in rejecting an instruction to the jury proposed by appellant to the effect that the value of the gold remaining in the sluice boxes in the Eastern Star Mining Claim when plaintiffs left the claim in 1942, if any, was not to be included in any award of damages the jury might make.

5. The Trial Court erred in awarding judgment to appellees for their attorneys' fees.

6. For the foregoing reasons the Trial Court erred in granting judgment in favor of appellees and in refusing to grant judgment in favor of appellant.

Dated: San Francisco, June 10, 1958.

/s/ RICHARD J. ARCHER,

/s/ MARSHALL L. SMALL,

MORRISON, FOERSTER, HOLLO-  
WAY, SHUMAN & CLARK,  
Attorneys for Appellant.

Certificate of Service by Mail Attached.

[Endorsed]: Filed June 11, 1958. Paul P.  
O'Brien, Clerk.

---

[Title of Court of Appeals and Cause.]

DESIGNATION BY APPELLANT OF  
RECORD TO BE PRINTED

1. Second Amended Complaint and Mining Lease  
which is an Exhibit thereto, Amended Answer and

Reply, being pages 2 through 20 inclusive of the Transcript of Record in cause No. 12367 in the above-entitled court.

2. Transcript of testimony at trial (pages 1 to 404 inclusive of Volume II).

3. Instructions to the Jury (pages 4 to 23 inclusive of Volume I).

4. Defendants' requested Instruction #1 (refused.) (not paginated).

5. Judgment filed March 10, 1958 (pages 1 to 2 inclusive of Volume I).

6. Notice of Appeal filed March 20, 1958 (page 3 of Volume I).

7. Designation by Appellant of Record on Appeal (pages 24 to 25 inclusive of Volume I).

8. Statement of Points on which Appellant Intends to Rely on Appeal (not paginated).

9. This Designation of Portions of Record to be Printed (not paginated).

Dated: San Francisco, June 10, 1958.

/s/ RICHARD J. ARCHER,

/s/ MARSHALL L. SMALL,

MORRISON, FOERSTER, HOLLO-  
WAY, SHUMAN & CLARK,  
Attorneys for Appellant.

Certificate of Service by Mail Attached.

[Endorsed]: Filed June 11, 1958. Paul P. O'Brien, Clerk.

No. 15,962

United States Court of Appeals  
For the Ninth Circuit

---

VUKA RADOVICH STEPOVICH, Executrix of the  
Estate of Mike Stepovich, deceased,

*Appellant,*

vs.

NICK KUPOFF, JAMES ZUKOEV, MIKE KITOFF,  
and NICK KABAK, a partnership doing  
business as North Star Mining Company,

*Appellees.*

BRIEF FOR APPELLANT.

---

RICHARD J. ARCHER,

MARSHALL L. SMALL,

MORRISON, FOERSTER, HOLLOWAY,

SHUMAN & CLARK,

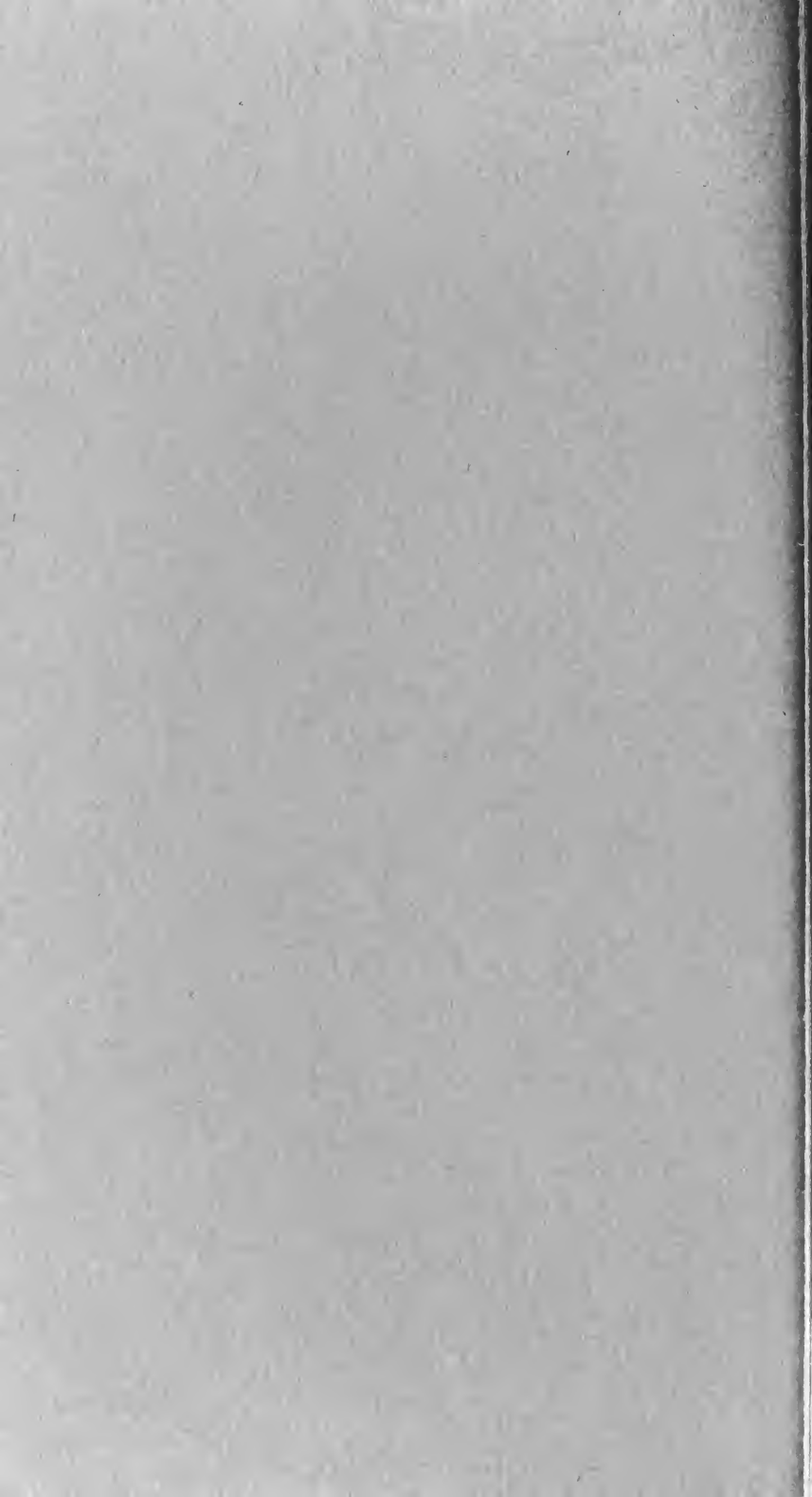
Crocker Building, San Francisco 4, California,

*Attorneys for Appellant.*

FILED

AUG 29 1958

PAUL P. O'BRIEN, CLERK





## Subject Index

---

|  | Page |
|--|------|
| Jurisdictional statement .....   | 1    |
| Statement of the case .....  | 2    |
| Specification of errors .....  | 10   |
| Summary of argument .....  | 11   |
| Argument .....   | 12   |
| I. Appellees did not introduce sufficient evidence to entitle them to a verdict or judgment .....  | 12   |
| A. Appellees failed to introduce independent evidence of either wrongful eviction or damages, as required by applicable statute of the Territory of Alaska ..  | 12   |
| B. Appellees' testimony relating to damages is inherently improbable and contrary to the physical facts of record .....  | 29   |
| C. Appellees' proof relating to damages is insufficient to support an award of substantial damages for loss of profits under the rules of law applicable to damages for wrongful eviction from mining leases | 36   |
| II. The size of the jury's verdict evidences a disregard of the instructions given by the trial court, and is not supported by the evidence .....  | 42   |
| III. The verdict of the jury was not entitled to any greater weight than that accorded the verdict of an advisory jury in an equity case .....   | 45   |
| Conclusion .....   | 47   |

### Appendix:

|  |    |
|--|----|
| I. Information with respect to exhibits .....  | i  |
| II. Motion for Directed Verdict or for a New Trial, and Order Denying Motion for Directed Verdict or for a New Trial ..... | ii |
| III. Documents relating to original setting of case for trial by jury .....  | iv |

## Table of Authorities Cited

---

| Cases  | Pages  |
|--|--------|
| American Car & Foundry Co. v. Kindermann, 216 Fed. 499 (8th Cir. 1914) .....                       | 30     |
| (American) Lumbermens Mut. Cas. Co. v. Timms & Howard, Inc., 108 F. 2d 497 (2d Cir. 1939) .....    | 46     |
| Anvil Mining Company v. Humble, 153 U.S. 540 (1894) ...  | 36, 43 |
| Atchison, Topeka & Santa Fe Ry. Co. v. Hamilton Bros., 192 F. 2d 817 (8th Cir. 1951) .....         | 30     |
| Boyle v. Bond, 187 F. 2d 362 (C.A.D.C. 1951) .....   | 44     |
| Brown v. Maryland Casualty Co., 55 F. 2d 159 (8th Cir. 1932) .....                                 | 35     |
| Butterfield v. Snively, 60 Ohio App. 14, 19 N.E. 2d 284 (1937) .....                               | 38, 43 |
| Central Coal & Coke Co. v. Hartman, 111 Fed. 96 (8th Cir. 1901) .....                              | 41     |
| Cobb v. Lepisto, 6 F. 2d 128 (9th Cir. 1925) .....   | 44     |
| Co-Efficient Foundation v. Woods, 171 F. 2d 691 (5th Cir. 1948) .....                              | 46     |
| Controller of California v. Lockwood, 193 F. 2d 169 (9th Cir. 1951) .....                          | 26     |
| Deadrich v. United States, 74 F. 2d 619 (9th Cir. 1935) ....                                       | 30     |
| Esterly v. Rua, 122 Fed. 609 (9th Cir. 1903) .....   | 13, 46 |
| Field v. Rodgers, 128 Or. 661, 275 Pac. 598 (1929) .....   | 14     |
| Flintkote Company v. Lysfjord, 246 F. 2d 368 (9th Cir. 1957), cert. den. 355 U.S. 835 (1957) ..... | 37     |
| F. W. Woolworth Co. v. Davis, 41 F. 2d 342 (10th Cir. 1930), cert den., 282 U.S. 859 (1930) .....  | 30     |
| Galloway v. United States, 130 F. 2d 467 (9th Cir. 1942), aff'd., 319 U.S. 372 (1943) .....        | 30     |
| Geigy Chemical Corp. v. Allen, 224 F. 2d 110 (5th Cir. 1955) .....                                 | 30     |
| Hann v. Venetian Blind Corp., 111 F. 2d 455 (9th Cir. 1940) .....                                  | 35     |
| Harding v. Grim, 25 Or. 506, 26 Pac. 634 (1894) .....  | 13, 14 |
| Hawkins v. Missouri Pac. R. Co., 188 F. 2d 348 (8th Cir. 1951) .....                               | 18, 20 |
| Hoosac Mining & Milling Co. v. Donat, 10 Colo. 529, 16 Pac. 157 (1887) .....                       | 37     |

# TABLE OF AUTHORITIES CITED

iii

|  | Pages  |
|--|--------|
| In re Banzer's Estate, 106 Or. 654, 213 Pac. 406 (1923) . . .  | 14     |
| In re Berger's Estate, 144 Or. 631, 25 P. 2d 138 (1933) . . .  | 14, 23 |
| In re Leslie, 119 Fed. 406 (D.C. N.D. N.Y. 1903) . . . . .   | 30     |
| In re Millon's Estate, 154 Or. 615, 61 P. 2d 1030 (1936) . .   | 14     |
| Kupoff v. Stepovich, 184 F. 2d 705 (9th Cir. 1950) . . . . .   | 2, 24  |
| Larabee Flour Mills Co. v. Carignano, 49 F. 2d 151 (10th Cir. 1931) . . . . .  | 30     |
| Lovas v. General Motors Corp., 212 F. 2d 805 (6th Cir. 1954) . . . . .   | 30     |
| Major v. Phillips-Jones Corp., 192 F. 2d 186 (2d Cir. 1951), cert. den. 343 U.S. 927 (1952) . . . . .  | 46     |
| Metropolitan Life Ins. Co. v. Armstrong, 85 F. 2d 187 (8th Cir. 1936) . . . . .  | 18, 20 |
| Moore v. Chesapeake & O. R. Co., 340 U.S. 573 (1951) . . . .   | 26     |
| Pennsylvania Pulverizing Co. v. Butler, 61 F. 2d 311 (3d Cir. 1932) . . . . .  | 38     |
| Phenix Jellico Coal Co. v. Grant, 136 Ky. 751, 125 S.W. 165 (1910) . . . . .   | 38, 43 |
| Putnam v. Lower, 236 F. 2d 561 (9th Cir. 1956) . . . . .   | 37     |
| Seaton v. Security Savings & Trust Co., 131 Or. 261, 282 Pac. 556 (1929) . . . . .   | 14, 15 |
| Smuggler-Union Mining Co. v. Kent, 47 Colo. 320, 112 Pac. 223 (1910) . . . . .   | 37, 43 |
| Standard Oil Company v. Moore, 251 F. 2d 188 (9th Cir. 1957) . . . . .   | 17     |
| Twin Lakes Hydraulic Gold Mining Syndicate, Ltd. v. Colorado M. Ry. Co., 16 Colo. 1, 27 Pac. 258 (1891) . . . .                                  | 19     |
| Uhler v. Harbaugh, 110 Or. 609, 224 Pac. 89 (1924) . . . . .   | 14     |
| United States v. Coal Cargo, 11 F. 2d 805 (D.C. E.D. Pa. 1924), affirmed, 11 F. 2d 809 (3d Cir. 1926), cert. den., 273 U.S. 696 (1926) . . . . . | 35     |
| United States v. Grayson, 166 F. 2d 863 (2d Cir. 1948) . . . .   | 17     |
| United States v. Kerr, 61 F. 2d 800 (9th Cir. 1932) . . . . .  | 38     |
| United States v. Uarte, 175 F. 2d 110 (9th Cir. 1949) . . . .  | 18, 20 |
| Virginian Ry. Co. v. Armentrout, 166 F. 2d 400 (4th Cir. 1948) . . . . .   | 44     |

|   | Pages  |
|---|--------|
| Walker v. Warehouse Transportation Co., 235 F. 2d 125 (1st Cir. 1956) .....                         | 18, 20 |
| Willett v. Fister, 18 Wall. (U.S.) 91 (1873) .....  | 30     |
| Wolfe v. National Lead Company, 225 F. 2d 427 (9th Cir. 1955), cert den., 350 U.S. 915 (1955) ..... | 37     |
| Wong Ken Foon v. Brownell, 218 F. 2d 444 (9th Cir. 1955) .....                                      | 30     |

### Rules

|  |    |
|--|----|
| Federal Rules of Civil Procedure, Rule 52(a) ..... | 47 |
|--|----|

### Statutes

|   |   |
|---|---|
| Alaska Compiled Laws (1933), Section 4417 .....                                   | 1, 13   |
| Alaska Compiled Laws Annotated (1949), Section 58-6-1 .....                       | 22, 24  |
| Alaska Compiled Laws Annotated (1949), Section 61-13-4 .....                      | 1, 12, 17, 20, 22, 25, 26, 27, 29, 42, 45, 46, 48 |
| Oregon Revised Statutes, Section 116.555 .....                                    | 13  |
| United States Statutes, Section 7, of the Act of May 17, 1884 (23 Stat. 25) ..... | 13  |
| 28 United States Code, Section 1291 .....   | 2   |
| 30 United States Code, Section 22 .....   | 19  |

### Texts

|  |    |
|--|----|
| 15 Am. Jur., Damages, Sections 20, 21 .....                                    | 36 |
| 20 Am. Jur., Evidence, Section 1183 .....                                      | 30 |
| 2 Barron & Holtzoff, Federal Practice and Procedure, Section 891, p. 596 ..... | 46 |
| 58 C.J.S., Mines and Minerals, Section 174, p. 373 .....                       | 38 |
| 5 Moore's Federal Practice (2d ed.), Par. 39.10[3], p. 725 .....               | 46 |
| Parks, Examination and Valuation of Mineral Property (1949), p. 42 .....       | 27 |
| I Wigmore on Evidence (3d ed.), Section 28 .....                               | 18 |
| II Wigmore on Evidence (3d ed.), Section 437 .....                             | 33 |
| III Wigmore on Evidence (3d ed.), Sections 790, 793 .....                      | 17 |

No. 15,962

# United States Court of Appeals For the Ninth Circuit

---

VUKA RADOVICH STEPOVICH, Executrix of the  
Estate of Mike Stepovich, deceased,

*Appellant,*

vs.

NICK KUPOFF, JAMES ZUKOEV, MIKE KITOFF,  
and NICK KABAK, a partnership doing  
business as North Star Mining Company,

*Appellees.*

## BRIEF FOR APPELLANT.

---

### JURISDICTIONAL STATEMENT.

This case arose as the result of a claim in the amount of \$106,791.29 filed by appellees against the Estate of Mike Stepovich for damages and lost profits due to appellees' alleged eviction from a mining lease (Pltfs' Ex. J). Appellees' claim was denied by Vuka Radovich Stepovich, Mike Stepovich's widow and the executrix of his estate (Pltfs' Exs. J and N), and appellees thereupon filed suit against her in the District Court for the Territory of Alaska, Fourth Division, as permitted by Section 4417, Compiled Laws of Alaska (1933) (now Section 61-13-4, Alaska Compiled Laws Annotated (1949)) (R. 3). Follow-

ing trial before a jury, the District Court directed a verdict for appellant. This result was reversed by this Honorable Court due to errors committed by the District Court in ruling on the applicable statute of limitations and in excluding certain items of evidence (184 F. 2d 705). Following a second trial, a jury awarded appellees a verdict of \$26,802.12, and the District Court, denying appellant's motion for a directed verdict or new trial, entered judgment on March 7, 1958, in that amount, plus an award of \$900.00 for appellees' attorney's fees, and \$93.04 for costs (R. 33). Appellant filed a notice of appeal with the District Court on March 20, 1958 (R. 35). This Honorable Court has jurisdiction to review the judgment of the District Court by virtue of Title 28, United States Code, Section 1291.

---

### **STATEMENT OF THE CASE.**

The principal questions for decision in this case are:

1. Did appellees introduce sufficient evidence independent of their own testimony (as required by the Alaska "dead man's" statute) to permit a jury to find that they had discovered a rich gold deposit and that Mike Stepovich wrongfully evicted them from a lease for the purpose of seizing this deposit for himself?

2. Did appellees introduce sufficient evidence of damages to support the verdict returned by the jury?

On February 13, 1942, Mike Stepovich granted a lease to Nick Kupoff, James Zukoev, and Paul Drazenovich, a partnership doing business as North Star Mining Company, to prospect for gold on certain land owned by

Stepovich near Fairbanks, Alaska (Pltfs' Ex. A, R. 9, 41-43). The lease provided for the payment of a  $33\frac{1}{3}\%$  royalty to the lessor from all gold recovered from the premises. (Pltfs' Ex. A, Par. 5, R. 11). A vertical 8x8 foot shaft had previously been sunk on the leased premises approximately 93 feet to bed rock in connection with prior mining operations thereon, in order to reach the level on which gold might be found (R. 45-46), and the lessees were to use this shaft (Pltfs' Ex. A—description of premises, R. 9). The lease also entitled the lessees to the use free of charge of the buildings and machinery located on the premises for use in operating the mine, including a hoist bucket and mine car, hoist, boiler plant, cables, tool sheds and cookhouse (Pltfs' Ex. A, par. 1; R. 10, 44-45, 48). Lessees were obligated under the lease to supply Stepovich with an accurate record of the results of all pannings (Pltfs' Ex. A, par. 7, R. 11), and Stepovich was entitled to enter upon the leased premises at any time and to pan the ground to ascertain its value, and to determine whether operations were being conducted in accordance with the lease (Pltfs' Ex. A, par. 9, R. 12).

On February 22, 1942, the lessees entered on the lease to commence operations (R. 43). They found the vertical shaft to be almost filled with water, ice, and debris, which they proceeded to remove (R. 46, 162). This operation required approximately one month's time (R. 46, 163). At the bottom of the shaft they found three horizontal shafts, or "drifts", in which explorations and mining operations had been previously conducted (R. 47). These drifts also contained some ice and debris, but their condition was "all right" (R. 164, 168), and the lessees

proceeded to clean up the longest one, which was 60-80 feet long (R. 47-48). They then commenced thawing, digging and removing dirt and gravel in search for gold-bearing dirt, and continued this process for approximately  $3\frac{1}{2}$  months (R. 168). During this period the lessees removed the dirt which they had excavated, dumped it on the surface in a pile, near and on top of the sluice boxes (which were used to separate out the gold), and subsequently processed it in order to separate out the gold (R. 48, 50, 127-8, 131-2, 174-5). The processing procedure involved washing or "sluicing" the dirt through the sluice boxes to allow the heavier gold to drop from the dirt and then removing or "cleaning up" the gold from the sluice boxes (R. 67, 133-4). The lessees conducted three so-called "clean-ups" during this period, yielding the sums of \$1130, \$1100, and \$1296 in gold, which sums were deposited in lessees' bank account on June 2nd and 16th and August 8, 1942 (Pltfs' Ex. S, R. 51, 67, 98-9). During this period, the lessees employed from one to five employees to work on the leased premises (Pltfs' Exs. D, E-1, & E-2).

On July 7, 1942 and July 9, 1942, Nick Kobak and Mike Kitoff, respectively, were taken into the partnership (Pltfs' Exs. B, C, R. 52).

One of the lessees, Nick Kupoff, testified that some time during the latter part of July or early part of August the lessees encountered gold-bearing gravel which showed better possibilities than anything they had encountered to date, and which panning showed contained a gold content averaging 50 cents to \$1 a pan (R. 78-9). Based on 7 pans per cubic foot or 189 pans per cubic yard (R. 80),



this would have amounted to from \$3.50 to \$7.00 per cubic foot, or \$94.50 to \$189.00 per cubic yard. Another of the lessees, James Zukoev, testified that the lessees encountered the so-called "pay streak" during the last part of June but after having his memory refreshed during a recess, testified that the discovery was made about July 20th (R. 173-4, 178-9). He was equally uncertain about the gold content of the gravel panned as he initially was about the date of discovery, indicating it sometimes panned out at \$1 a pan, sometimes less and sometimes more, and that it sometimes averaged a dollar a pan, and sometimes less than a dollar (R. 169, 173), and at one point guessed that it maybe even averaged \$1.60 or \$1.80 a pan (R. 173), but even lessees' own counsel did not give credence to this latter guess (R. 226, 274, 324, 382). Both of these witnesses had previously been employed as unskilled laborers, and neither had prior experience in actually panning for and evaluating gold-bearing gravel in placer mining operations (R. 125-7, 157-9). Plaintiffs offered no evidence as to the weight of the gold panned nor any other evidence of the value of their supposed find.

Earl H. Beistline, Dean of the School of Mines at the University of Alaska, called as a defense witness, testified that on the basis of Kupoff's and Zukoev's most conservative estimate of their find (i.e. 50 cents a pan, or \$94.50 a cubic yard), it would have been a "very profitable operation," containing "very fine dirt," but that he was unaware of any appreciable quantities of gold-bearing gravel of that quality in the Fairbanks area at the time of trial (R. 283-4). Even plaintiffs' counsel ad-

mitted that 50 cents a pan was considered to be "exceptionally rich ground" (R. 232). Dean Beistline further pointed out that even if the plaintiffs *had* found such a placer deposit, there was no way to determine its potential yield (short of mining out the entire area) unless intensive test drilling operations were conducted (R. 268-272). None were conducted by plaintiffs or anyone competent to testify at the trial.

Although plaintiffs' own testimony suggests that they had after arduous months of labor discovered a rich pay streak (indeed, according to Dean Beistline, richer than any existing deposit in the Fairbanks area), their subsequent conduct clearly indicates that no such discovery had in fact been made. The short Alaskan summer was fast running its course, and plaintiffs, faced with the prospect that winter snows and ice would again fill up the mine shaft, should have been prompted to increase the tempo of their mining operations to remove their supposedly rich find. Indeed, their counsel argued to the jury that they were concentrating on getting as much money out of the supposedly rich gravel as early as they possibly could (R. 399-400). However, *the facts* clearly show that from the week ending June 20th on, they consistently employed only two miners (and at times only one), although previously they had at times employed as many as five miners a day (Pltfs' Exs. D, E-1, & E-2). On August 6, 1942, Paul Drazenovich, one of the original partners, quit the venture and transferred his interest to the remaining partners in return for their agreement to assume his portion of the partnership liabilities (Pltfs' Exs. I & M).

Plaintiffs never conducted another clean-up, and became delinquent in the payment of their accounts, failing to pay Mike Stepovich his share of the proceeds from the August 2nd clean-up, plus part of the proceeds of earlier clean-ups, plus payment of the first installment of rental for a small tractor used by appellees under the lease. This installment was for use from the date of inception of the lease, and was to have been paid in July, 1942 (Pltfs' Ex. A, par. 4, R. 10). As a result, on August 8th Stepovich served a demand on the lessees for such payment, together with certain other bills then due and owing, including one bill owed by plaintiffs to a merchant which Stepovich had paid on their account (Pltfs' Ex. H). This demand was satisfied on that same date (R. 74), but this left plaintiffs with a bank balance of only \$233.72, which by August 10th was further reduced to \$29.12 by the payment of additional bills (Pltfs' Ex. G). Their account continued in this status until August 28th (after they had left the premises), when \$61.88 was deposited, and the account was then promptly closed by paying the bank a service charge and paying their accountant the balance in the account (Pltfs' Ex. G).

Plaintiffs' counsel indicated that it was necessary to run clean-ups in order to obtain money to pay their men (R. 356, 363). Under these circumstances, one would have expected plaintiffs to run additional clean-ups in August to secure funds, particularly in view of the fact that they had removed a quantity of gravel from their allegedly rich "pay streak" and dumped it on the ground by the sluice boxes (R. 80-1, R. 137-40). Yet no clean-ups

were made (R. 81, 174). The reason they did not do so is clear—the gravel removed from the so-called “pay streak” had a very low gold content. This was established by two mining engineers employed by the defendant to make independent tests of the gravel dump by the sluice boxes (R. 293, 300-301, 317-18, 319-20). Their testimony disclosed that the entire dump contained less than \$800 in gold (R. 301, 320).

Mike Stepovich apparently feared that plaintiffs, in failing financial circumstances, were taking the gold from the sluice boxes prior to clean-up, without accounting to him (R. 243-5). Under the terms of the lease they were to clean up only in his presence or in the presence of his agent (Pltfs’ Ex. A, par. 8, R. 11). On August 21, 1942, he filed suit against the plaintiffs for certain amounts claimed to be due and attached their supplies and the contents of the sluice boxes (Pltfs’ Exs. K, L, Q, R-1, 2, 3, 4 & T). Four of the five claims sued on represented amounts admittedly owing by the lessees on account to local merchants, which accounts had been assigned to Stepovich (Pltfs’ Ex. T, R. 120-1, 184-5). The fifth claim was for the use of a large RD-7 caterpillar tractor with bulldozer owned by Stepovich. (Lessees also had the use of a smaller caterpillar tractor under the lease (Pltfs’ Ex. A, par. 4, R. 10)). Although Nick Kupoff denied that the lessees ever used the larger RD-7 tractor or had any dealing with it (R. 119), James Zukoev admitted that they had an agreement with Stepovich whereby they were permitted to use this tractor to plow out the road to the mine on condition that they also plow out the road to Stepovich’s house so that he could come

down to his house (R. 161-2). Zukoev in effect admitted that the lessees breached this agreement by cleaning the road off only to the mine, and not cleaning the road off to Stepovich's house until a later date (R. 161-2). It is reasonable to assume that Stepovich accordingly treated the agreement as rescinded, and sued for the reasonable value for use of the tractor.

As a result of the suit by Stepovich, plaintiffs left the premises, and never returned except to pick up their personal belongings (R. 148, 183, 185). On September 26, 1942, Mike Stepovich leased the premises to United States Smelting, Refining and Mining Company for a period of fifty years (R. 109). In spite of the seeming richness of the underlying deposit (if plaintiffs' testimony is worthy of belief), no mining operations have ever been conducted under that lease and the premises were at the date of trial in the same condition as when originally leased to that company in 1942 (R. 110).

During the early part of October, 1942, Mike Stepovich and his family left Alaska and settled in the Continental United States (R. 243, 245-6). On November 24, 1942, Mike Stepovich's suit against plaintiffs was dismissed pursuant to a motion for voluntary nonsuit made after the court refused to grant his attorney a continuance (R. 85; Pltfs' Ex. O).

Plaintiffs made no attempt to regain possession of the leased premises so that they could once again mine their supposedly rich "pay streak" nor did they counterclaim in Stepovich's suit against them or otherwise seek legal relief. Instead, they waited until after Mike Stepovich's death and then filed a claim against his estate in the

amount of \$106,791.29 (Pltfs' Ex. J). Their claim was rejected (Pltfs' Exs. J and N), and they then filed suit against Vuka Radovich Stepovich, Mike Stepovich's widow and the executrix of his estate alleging in their complaint, *inter alia*, that they had left a large amount of rich unsluiced gravel dumped by the sluice boxes, and that there was \$20,000 in gold in the dump and in the sluice boxes (R. 6).

---

### **SPECIFICATION OF ERRORS.**

1. The Trial Court erred in refusing to grant appellant's motion for a directed verdict on the ground that appellees failed to prove any loss of profits and failed to present sufficient evidence to entitle the case to go to the jury.

2. The Verdict and Judgment are unsupported by the evidence because the testimony and exhibits offered and admitted into evidence at the trial were insufficient to show that appellees sustained damages in any amount, and further that such testimony and exhibits were insufficient to show that appellees sustained damages in the amount awarded by the jury.

3. For the foregoing reasons the Trial Court erred in granting judgment in favor of appellees and in refusing to grant judgment in favor of appellant.

### SUMMARY OF ARGUMENT.

I. Appellees did not introduce sufficient evidence to entitle them to a verdict or judgment.

A. Appellees failed to introduce independent evidence of either wrongful eviction or damages, as required by applicable statute of the Territory of Alaska.

1. Insufficiency of proof of discovery of pay streak.

2. Insufficiency of proof of Mike Stepovich's knowledge of alleged pay streak.

3. Insufficiency of proof of spurious nature of suit filed by Mike Stepovich.

4. Insufficiency of proof that Mike Stepovich converted the gold in the sluice boxes and gravel dump.

5. Insufficiency of proof of the value of the gold allegedly converted by Mike Stepovich.

B. Appellees' testimony relating to damages is inherently improbable and contrary to the physical facts of record.

C. Appellees' proof relating to damages is insufficient to support an award of substantial damages for loss of profits under the rules of law applicable to damages for wrongful eviction from mining leases.

II. The size of the jury's verdict evidences a disregard of the instructions given by the trial court, and is not supported by the evidence.

III. The verdict of the jury was not entitled to any greater weight than that accorded the verdict of an advisory jury in an equity case.

**ARGUMENT.****I****APPELLEES DID NOT INTRODUCE SUFFICIENT EVIDENCE  
TO ENTITLE THEM TO A VERDICT OR JUDGMENT.**

- A.** Appellees failed to introduce independent evidence of either wrongful eviction or damages, as required by applicable statute of the Territory of Alaska.

Section 61-13-4 of Alaska Compiled Laws Annotated (1949) which governs the allowance and rejection of claims against decedents' estates, provides pertinently:

“When the claim is presented to the executor or administrator, . . . if he shall be satisfied that the claim thus presented is just, he shall indorse upon it the words ‘Examined and approved,’ with the date thereof, and sign the same officially, and shall pay such claim in due course of administration; but if he shall not be so satisfied he shall indorse thereon the words ‘Examined and rejected,’ with the date thereof, and sign the same officially. . . . If any executor or administrator shall refuse to allow any claim or demand against the deceased after the same may have been exhibited to him in accordance with the provisions of this act, the claimant may present his claim to the commissioner having jurisdiction or to the district court or the judge thereof for allowance, giving the executor or administrator thirty days’ notice of such application to the court. The district court or the judge thereof shall have power to hear and determine in a summary manner all demands against any estate agreeably to the provisions of this chapter, and which have been so rejected by the executor or administrator, and shall cause a concise entry of the order of allowance or rejection to be made on the record, which order shall have the force and effect of a judgment from which an appeal may be taken as in



ordinary cases: *Provided No claim which shall have been rejected by the executor or administrator, as aforesaid, shall be allowed by any court, judge, referee, or jury, except upon some competent or satisfactory evidence other than the testimony of the claimant. . . .*" (Italics added.)

The foregoing statutory language has been a part of the law of the Territory of Alaska at all times pertinent to the present litigation.

See also Section 4417, Comp. Laws Alaska (1933).

This provision was based on a similar provision contained in the Code of Civil Procedure of the State of Oregon (the pertinent portion of which is now found in Section 116.555, Oregon Revised Statutes), which was originally made applicable to the Territory of Alaska by Section 7 of the Act of May 17, 1884 (23 Stat. 25), and this Court has in the past looked to decisions of the Oregon Supreme Court as a guide in construing the Alaskan statute.

*Esterly v. Rua*, 122 Fed. 609, 612-13 (9th Cir. 1903).

The Oregon Supreme Court has in a long series of decisions applied this statutory provision rigorously to prevent the assertion of claims against decedents' estates unless clearly supported by evidence other than that supplied by the interested claimants.

In the early case of *Harding v. Grim*, 25 Or. 506, 508, 26 Pac. 634 (1894) that court laid down the applicable rule as follows:

" . . . The effect of this statute is that, while the claimant is a competent witness in an action against an executor or administrator upon a claim or demand

against the estate of the deceased, he cannot prevail in the action unless he proves his case by some competent or satisfactory evidence other than the testimony of himself. His testimony may be used, perhaps, to corroborate other evidence in the case, but it is not sufficient, in itself, to establish his claim. There must be evidence tending to support the action, independent of his testimony, sufficient to go to the jury, and upon which the jury, or other trier of fact, would be authorized to find in his favor. As a consequence, it was incumbent on the plaintiff in this case to furnish some competent evidence tending to support his claim, other than his own testimony, and unless he did so the nonsuit was properly granted. . . .”

The rule adopted in the *Harding* case has since been consistently followed by the Oregon Supreme Court.

See:

*In re Banzer's Estate*, 106 Or. 654, 213 Pac. 406 (1923);

*Uhler v. Harbaugh*, 110 Or. 609, 224 Pac. 89 (1924);

*Field v. Rodgers*, 128 Or. 661, 275 Pac. 598 (1929);

*Seaton v. Security Savings & Trust Co.*, 131 Or. 261, 282 Pac. 556 (1929);

*In re Berger's Estate*, 144 Or. 631, 25 P. 2d 138 (1933);

*In re Millon's Estate*, 154 Or. 615, 61 P. 2d 1030 (1936).

The philosophy to be adopted by the courts in administering this statutory provision was clearly stated in *Uhler v. Harbaugh*, *supra*, as follows (110 Or. at 617, 224 Pac. at 91):

“... It should be remembered that at common law, and in many of the states by statute, a claimant against the estate of a deceased person is not permitted to testify. In view of the fact that the lips of an alleged promisor are sealed by death, and of the frequent attempts of unscrupulous persons to palm off fictitious claims under such circumstances, lawmakers have been, and courts should be, zealous to protect estates from the consequences of such attempts, and hence the rule adopted by our statute as construed in our opinions above cited.”

Consequently, a claimant against an estate is required under the statute to present a complete *prima facie* case *independent of his own testimony*. As concisely stated in *Seaton v. Security Savings & Trust Co.*, *supra* (131 Or. at 271, 282 Pac. at 559) the statute:

“... exacts of a claimant proof of the material features of her demand independent of her personal testimony. This nonpersonal proof need not be of such cogency that alone it can overcome any proof which the defendant might assemble, but alone it must establish a *prima facie* case in behalf of the plaintiff. The plaintiff's personal testimony may reinforce and corroborate this independent testimony, but the latter must be so complete, as to the material items of the claim, that it does not need any piecing out by the personal testimony of the claimant. . . .”

It is abundantly clear from an examination of the record in the instant case that appellees have utterly failed to satisfy the statutory requirement that their claim be supported by competent or satisfactory evidence other than their own testimony.

The gist of appellees' complaint in this case is that Mike Stepovich, knowing that appellees had discovered a rich pay streak, caused them to be evicted from the leased premises in order to secure the profits therefrom for himself by filing a suit based on certain spurious claims, and by attaching their possessions and the contents of their gravel dump and the sluice boxes, and that he thereafter dismissed his spurious suit after he had succeeded in converting to his own use the gold contained in the sluice boxes and the gravel dump. The essential elements which it was necessary for appellees to prove in order to recover for a *wrongful* eviction were therefore: (1) the discovery by appellees of a rich pay streak, (2) Mike Stepovich's knowledge that appellees had discovered such a pay streak, (3) the spurious nature of the suit filed by him, (4) the conversion by Stepovich of the gold contained in the sluice boxes and gravel dump, and (5) the value of the gold converted by Stepovich, and remaining in the mine i.e., appellees' lost profits. As the following analysis demonstrates, appellees did not introduce evidence independent and apart from their own testimony to make out a *prima facie* case on any one of these elements.

(1) *Insufficiency of proof of discovery of pay streak.*

The only evidence that appellees had in fact discovered a pay streak came from their own lips. They did make some effort to show there *might* have been gold on the leased premises by three methods independent of their own testimony: (1) attempted proof of drill holes on a map of the leased premises, (2) attempted proof that another miner had found gold elsewhere on the leased prem-

ises, approximately seven years previously, and (3) proof of the release of the premises to another mining company after the eviction of appellees. (Appellees also attempted to prove that the lease between Mike Stepovich and lessees called for a higher royalty than that normally found in the Fairbanks area, but they attempted to prove this only by their own testimony.) Even if such evidence had all been admissible, it would not have made out a *prima facie* case, as required by Section 61-13-4, that *appellees* had *in fact* found a rich pay streak. In any event, the first two such attempted offers were correctly rejected by the trial court, and the proof of release of the premises was shown by cross-examination to be no evidence of value.

The attempted proof of drill holes—which were made by two different companies—was rejected because appellees produced no one competent to testify as to the preparation of the map and information thereon concerning drill holes (R. 105-109) and hence any attempt to have some person unconnected with such preparation read them into evidence would have constituted the rankest sort of hearsay.

See:

*III Wigmore on Evidence* (3d ed.) Secs. 790, 793.

Appellees' counsel made no attempt properly to qualify the map and the drill hole information thereon for admission under any recognized exception to the hearsay rule.

See:

*United States v. Grayson*, 166 F.2d 863, 869 (2d Cir. 1948);

*Standard Oil Company v. Moore*, 251 F.2d 188, 214 (9th Cir. 1957).

In any event, such information would not have constituted evidence that *appellees* made a valuable find.

The attempted proof that another miner had found some gold on the premises seven years earlier was rejected because there was no evidence to show that he had been working anywhere near where *appellees* had worked on the lease (the lease covering an area of 40 acres, according to the description contained in the lease—R. 9). Expert testimony established that placer deposits are extremely irregular, and that there is no certainty that a deposit will extend for more than a few feet unless intensive drilling operations are conducted to prove the extent of the deposit (R. 264, 266, 268-72, 313-16, 326-7). Consequently the proffered evidence was correctly rejected by the trial court as being of remote probative value.

See:

I *Wigmore on Evidence* (3d ed.) Section 28.

The decision of the trial court should not be disturbed in the absence of an obvious abuse of discretion.

See:

*United States v. Uarte*, 175 F. 2d 110, 112 (9th Cir. 1949);

*Metropolitan Life Ins. Co. v. Armstrong*, 85 F. 2d 187, 193 (8th Cir. 1936);

*Walker v. Warehouse Transportation Co.*, 235 F. 2d 125, 129 (1st Cir. 1956);

*Hawkins v. Missouri Pac. R. Co.*, 188 F. 2d 348, 351-2 (8th Cir. 1951).

The fact that Stepovich re-leased the premises did not constitute independent proof that *appellees* had discov-

ered a rich pay streak. Indeed, cross-examination disclosed that the new lessee had never attempted to mine the premises and that they were at the time of trial in 1957 in the same condition as when the appellees left the premises in 1942 (R. 110). Even the fact that a parcel of land is patented as a placer claim under the mining laws of the United States, which by statute provides for patenting only of the lands containing "valuable mineral deposits" (30 USC Section 22) is not evidence from which a jury is entitled to infer in fixing damages in condemnation proceedings that the land *in fact* contains *profitable* deposits, as it might not then contain gold in sufficient quantity for profitable working.

See:

*Twin Lakes Hydraulic Gold Mining Syndicate, Ltd.*  
*v. Colorado M. Ry. Co.*, 16 Colo. 1, 27 Pac. 258  
 (1891).

The fact that a lease which has never been operated under has been made of certain premises should be entitled to no higher standing. Furthermore, it may be assumed that the releasing occurred in connection with Stepovich's settlement of his affairs incident to his permanent departure from Alaska, and not as an attempt to cash in on appellees' allegedly rich find. Otherwise why execute a 50-year lease to someone else?

In addition, it should be noted that appellees' attempted proof that the lease in question called for a higher royalty than that normally paid in the area was properly rejected as merely indicative of the fact that Mike Stepovich was a hard bargainer, and was not sufficiently probative of value to warrant its admission in evidence. In-

deed, the fact that appellees by their own admission conducted exploratory operations for 3½ months without notable success (R. 168) would appear to cast serious doubts on the supposed richness of the leased premises. In any event, the question, involving as it did, the exclusion of evidence of remote probative value, was properly within the sound discretion of the trial court to determine.

See:

*United States v. Uarte, supra;*

*Metropolitan Life Ins. Co. v. Armstrong, supra;*

*Walker v. Warehouse Transportation Co., supra;*

*Hawkins v. Missouri Pac. R. Co., supra;*

and the fact that proof was offered through appellees' own testimony renders it unavailable in testing the sufficiency of appellees' showing under Section 61-13-4.

It is therefore clear that appellees did not introduce enough evidence, aside from their own testimony, to warrant a finding that they had in fact discovered a pay streak.

(2) *Insufficiency of proof of Mike Stepovich's knowledge of alleged pay streak.*

Appellees' counsel attempted to portray Mike Stepovich as a greedy and grasping individual who constantly hovered over appellees and, as soon as he learned of their rich discovery took action to evict them from the leased premises. Appellant does not deny that Mike Stepovich may have observed appellees' operations and taken panning samples himself from the mine. This was his right under the terms of the lease (Pltfs' Ex. A, par. 9, R. 12),



and appellees were also obligated to supply him with the results of their panning (Pltfs' Ex. A, par. 7, R. 11). But there is not one shred of independent evidence that Mike Stepovich knew that appellees had discovered any rich pay streak—except to the extent that it may be implied from appellees' own testimony. Perhaps it could also be implied from the fact that Stepovich filed suit against appellees—except that, as indicated below, the record discloses no unequivocal evidence aside from appellees' own testimony that the suit was filed in a bad faith effort by Stepovich to seize appellees' alleged bonanza. Furthermore, the suit was not filed until three weeks to a month after appellees by their own testimony allegedly hit their pay streak (Pltfs' Ex. T, R. 79-80, 178-9).

(3) *Insufficiency of proof of spurious nature of suit filed by Mike Stepovich.*

Once again, the only unequivocal evidence that Stepovich's suit against appellees was without foundation comes from appellees' own lips, yet appellees themselves admitted that four of the five claims sued on by Stepovich were owed by them to local merchants and assigned to Stepovich (R. 120-2, 184-5). There was testimony (*again only from appellees*) suggesting that one of these claims may subsequently have been reassigned by Stepovich (R. 122-3) but not even this testimony warranted the inference that the claim had not been bona fide assigned in the first instance and Nick Kupoff in fact admitted that the assignment had been made (R. 122). Appellees did dispute their liability on the largest claim—for the use of a large RD-7 caterpillar tractor. But here again we are left to

rely only on appellees' own testimony, and it is in connection with this claim that we can see clearly that appellees were less than candid in their testimony. Nick Kupoff flatly stated that the appellees never used this tractor and never had any dealing with it (R. 119). On the other hand, James Zukoev did admit that appellees in fact used the tractor pursuant to an agreement with Stepovich that they would clean the road out, including the road to Stepovich's house (R. 161). He admitted that they only cleaned the road out to the mine, and neglected until later to clean out the road to Stepovich's house (R. 161-2). How much later we do not know. Nor do we know whether Stepovich considered this a breach of his agreement with them and hence billed them accordingly for the reasonable value of the use of the tractor. His widow (the present appellant) did not move out from Fairbanks to join her husband at their house near the lease until July 1942, due to illness in the family and destruction of their home in a fire (R. 242-3). Accordingly, she was not on the premises at the time of this transaction involving the large tractor, and so had no knowledge of it, even if her testimony would have otherwise been admissible under Section 58-6-1 of Alaska Compiled Laws (1949). This illustrates the difficult problem of proof that is posed when dealing with claims against an estate, particularly when there is no independent evidence of the dealings between the parties. Whose burden is it to show the true nature of the transaction? Section 61-13-4 clearly places the burden on appellees. This is only just in a case such as this where appellees waited until after Mike Stepovich's death to file a claim. Claims filed under such cir-

cumstances should be carefully scrutinized (*In re Berger's Estate*, *supra*, 144 Or. at 653, 25 P. 2d at 146), and deserve to be regarded with suspicion.

It might be argued that two equivocal items of independent evidence, lend support to the claimed spurious nature of Mike Stepovich's suit: (1) the demand previously made by Mike Stepovich on August 8, 1942, for the payment of certain other items on account, and (2) the voluntary dismissal by Stepovich of his suit in November, 1942. However, neither item alone, nor both together, are sufficient proof by themselves of the spurious nature of Stepovich's suit *without recourse to appellees' own testimony to so depict them*. Furthermore, each incident is explained on grounds other than Mike Stepovich's desire to obtain appellees' supposed golden treasure trove. As pointed out in the statement of the case at pages 2 to 10 of this brief, the actual physical facts of record (as distinguished from appellees' own testimony) show rather clearly that appellees—far from having found a bonanza—were actually in failing financial circumstances during the first part of August. Stepovich accordingly demanded payment of accounts to date. Had he then demanded payment for rental of the RD-7 tractor he would have driven appellees out of business at that time, for their bank balance shows they would have been unable to pay such a demand (Pltfs' Ex. G). Subsequently, as Stepovich became convinced that appellees were improperly taking gold from the sluice boxes, he decided to assert the claim for the tractor, together with four other claims which appellees admit were in fact owed by them. The most that can be inferred from this action is that

Stepovich was willing to bring a suit, one claim of which was open to dispute, in order to put pressure on appellees to vacate the premises. It does not *by itself* show that Stepovich had no tenable basis for the suit and it in no way *by itself* shows that Stepovich brought the suit in bad faith as a means of obtaining appellees' supposed treasure trove. (The testimony of Stepovich's widow as to his concern about the withdrawal of gold from the sluice boxes was, of course, properly admissible, because, as pointed out by this Court in its previous opinion (184 F. 2d at 707, N. 2), Section 58-6-1 of Alaska Compiled Laws (1949), permits such statements of a decedent to be introduced in evidence in a civil action by or against an executor when a party to the action appears as a witness in his own behalf.)

The nonsuit in November, 1942, similarly is explained on a basis consistent with the fact that Stepovich was not attempting to seize appellees' treasure trove. By November, 1942, appellees had long since quit the premises, and never tried to resume mining operations on the leased premises (R. 185). They had not attempted to recover possession of the premises and had not even bothered to file a counterclaim in Stepovich's suit against them. Stepovich and his family had left Alaska to settle permanently in the Continental United States (R. 243, 245-6), and he had re-leased the premises. The trial court refused to grant a continuance of the suit. Under these circumstances, Stepovich, who was in ill health (R. 242) had insufficient interest in returning to Alaska in the middle of World War II, to testify at the trial, as he would have been

required to do. Consequently, he consented to a voluntary nonsuit.

Accordingly, it is clear that the only *independent* evidence concerning Mike Stepovich's conduct is not sufficient by itself to sustain a *prima facie* case that Stepovich acted in bad faith in bringing suit against appellees in order to convert their supposed treasure trove. There is no other independent evidence to give it the additional weight necessary to present a *prima facie* case. It takes on an invidious cast only in the light of appellees' own testimony as to the existence of their buried treasure. But Section 61-13-4 wisely precludes judging such ambiguous evidence in the light of appellees' interested testimony, and it must therefore be viewed as insufficient to support the jury's verdict.

(4) *Insufficiency of proof that Mike Stepovich converted the gold in the sluice boxes and gravel dump.*

The existence of any appreciable quantities of gold in the gravel dump and sluice boxes at the time of Stepovich's suit is proven only by appellees' own testimony which, as noted below, is itself open to serious contradictions. However, not even appellees attempted to testify that Stepovich processed the gold in the dump and removed the gold from the sluice boxes. James Zukoev testified that when he returned to the premises about a week after appellees had left, the dump was still there (R. 183), and Nick Kupoff admitted that so far as he knew, the dump could at the time of trial have been just as it was when appellees left the premises (R. 290-1). Therefore, there is no evidence—*independent* or *interested*—to show that Mike Stepovich converted any

gold left on the premises by appellees, and any verdict by the jury that he did so constitutes the sheerest speculation, which is an improper means of arriving at any finding of fact by either a court or jury.

See:

*Moore v. Chesapeake & O. R. Co.*, 340 U.S. 573 (1951);

*Controller of California v. Lockwood*, 193 F. 2d 169 (9th Cir. 1951).

(5) *Insufficiency of proof of the value of the gold allegedly converted by Mike Stepovich.*

Even if all of the meager independent evidence introduced by appellees in this case be given a connotation unfavorable to appellant, we are still in the last analysis driven back to the fundamental question—did appellees in fact uncover a rich pay streak. Unless appellees can unequivocally answer this question in the affirmative by independent evidence, they have no claim against appellant, for they have not demonstrated by evidence deemed reliable by Section 61-13-4 that they were damaged. The question is not simply one of calculating *how much* appellees were damaged, but, more fundamentally, whether they were in fact damaged at all. If their supposedly rich pay streak is a figment of their own imagination, then they have no right to damages. Furthermore, even if they left some gold in the gravel dump and sluice boxes when they left the premises, they must show by independent evidence the amount and value of such abandoned treasure trove. To allow them to fix the fact and amount of damage by their own testimony and nothing more would completely eviscerate the protection

afforded by Section 61-13-4 to decedents' estates against the presentation of fictitious or vastly inflated claims.

Yet appellees have made no effort to verify by independent proof either the value of their alleged find, if any, or the amount of gold-bearing gravel removed by them from their alleged pay streak. The circumstances of this case demonstrate vividly why protection such as that provided by Section 61-13-4 is so necessary.

Appellees were by their own admission unskilled laborers with no prior experience at panning and evaluating gold in placer deposits (R. 125-7, 157-9). They apparently estimated the value of their findings merely by looking at the pans, without weighing the gold recovered, although the expert mining engineers called by appellant took pains to weigh their samples (R. 294, 318). Appellees sought no independent verification of their findings. In this connection, it should be noted that a number of errors can arise in sampling due to such factors as salted, or erroneous samples, an insufficient number of samples, improper location of samples, improper chemical analysis, and incorrect weighing of assays.

Parks, *Examination and Valuation of Mineral Property* (1949), p. 42.

That appellees' claims may well have been exaggerated may be inferred from their own testimony regarding the amount of supposedly rich gravel removed by them from the alleged pay streak and dumped by the sluice boxes. James Zukoev testified that a block of gravel 62 feet by 6 feet by 12 feet was removed from the pay streak (R. 170-2, 180). This would have amounted to 4464 cubic feet, or 165 $\frac{1}{3}$  cubic yards (Zukoev at one point also stated erro-

neously that a block 62 feet by 6 feet by 32 feet had been removed (R. 172), but he subsequently corrected this statement (R. 180)). Nick Kupoff's testimony as to the dimensions of the area mined in the pay streak tended to corroborate Zukoev's figures (R. 78-9, 115), and appellees' counsel indicated that he thought a block of gravel measuring 60 feet by 12 feet by 6 feet, or about 170 cubic yards, had been removed (R. 228, 383). In spite of Kupoff's and Zukoev's general agreement on the dimensions of the area mined in their alleged "pay streak", their estimates of yards of gravel removed and processed were at considerable variance with this testimony. Thus Kupoff testified that appellees removed somewhere around "four, five hundred" (unit of measurement unspecified) from their alleged "pay streak" (R. 80). On cross-examination, he indicated that appellees left either 200-300 yards, or 300-400 yards of gravel dumped by the sluice boxes when they left the premises (R. 138), and that this dump was from the "pay streak" (R. 138-9). Presumably, the balance, if any, had been run through the sluice boxes. James Zukoev testified that appellees had *sluiced* around 500 yards or more of the dirt from their alleged "pay streak", and yet when they left the premises, a large amount of gravel from the pay streak remained to be sluiced (R. 181-2). Appellees' testimony as to the amount of gravel removed from their alleged pay streak is therefore clearly at variance with their own testimony as to the dimensions of the area mined, and exaggerates the amount of gravel removed by more than three-fold!

Might not appellees have been guilty of similar exaggeration in estimating the value of the gold panned by them? Who could have contradicted them if they had



estimated their panning to average \$100 a pan instead of 50¢ to \$1? Even at 50¢ a pan, their estimate would have meant the discovery of a deposit (albeit of uncertain quantity) richer than anything known in the Fairbanks area at the time of trial. Here then is the strongest kind of case calling for a rigorous application of Section 61-13-4. In a case of this sort, where the lips of the one person who might be able to refute appellees' claim have been sealed by death, a court should require more proof than the interested testimony of appellees who were unskilled at gold evaluation in any case—before sustaining a substantial claim against an estate. Section 61-13-4 requires that claimants obtain more reliable proof by providing that no claim shall be allowed by “*any court, judge, referee, or jury*, except upon some competent or satisfactory evidence other than the testimony of the claimant.” Appellees have utterly failed to produce such evidence to substantiate their claim of discovery of a valuable pay streak, and, accordingly, the jury should not have been allowed to return a verdict for them.

**B. Appellees' testimony relating to damages is inherently improbable and contrary to the physical facts of record.**

Even if Section 61-13-4 had not been a part of the Alaskan statutory law, the verdict and judgment in this case would still be subject to attack on another and wholly independent ground—namely, that appellees' testimony relating to their discovery and removal of a rich pay streak is inherently improbable and contrary to the physical facts of record. Where oral testimony is positively contradicted by the physical facts, neither the court nor jury can be permitted to give it credence.

See:

- Deadrich v. United States*, 74 F. 2d 619, 622 (9th Cir. 1935);  
*Galloway v. United States*, 130 F. 2d 467, 471 (9th Cir. 1942), aff'd., 319 U. S. 372 (1943);  
*Lovas v. General Motors Corp.*, 212 F. 2d 805, 808 (6th Cir. 1954);  
*Atchison, Topeka & Santa Fe Ry. Co. v. Hamilton Bros.*, 192 F. 2d 817, 822 (8th Cir. 1951);  
*American Car & Foundry Co. v. Kindermann*, 216 Fed. 499, 502 (8th Cir. 1914);  
*F. W. Woolworth Co. v. Davis*, 41 F. 2d 342, 347 (10th Cir. 1930); cert. den., 282 U.S. 859 (1930);  
*Larabee Flour Mills Co. v. Carignano*, 49 F. 2d 151, 153 (10th Cir. 1931).

Courts are not required to give credit to inherently improbable testimony even though it is not contradicted.

See:

- Geigy Chemical Corp. v. Allen*, 224 F. 2d 110, 114 (5th Cir. 1955);  
 20 Am. Jur., *Evidence*, Section 1183;  
*In re Leslie*, 119 Fed. 406, 411 (D.C. N.D. N.Y. 1903);  
*Wong Ken Foon v. Brownell*, 218 F. 2d 444, 446 (9th Cir. 1955).

In *Willett v. Fister*, 18 Wall. (U.S.) 91 (1873), the United States Supreme Court reversed a judgment entered against an estate after looking at the probabilities of the case as deduced from the evidence (including the improbable nature of the plaintiff's testimony), the long

delay of the complainant to assert any claim, and the fact that the person against whose estate the claim was made had died before any suit had been filed.

Even if appellees could show that they were wrongfully evicted from the premises, their right to recover damages still rests on their assertion of discovery of a rich pay streak. The only evidence in the record in support of such a discovery is their own testimony, which taken at their most conservative estimate, would have indicated a deposit richer than anything known in the Fairbanks area at the time of trial (R. 283-4). Their testimony also disclosed that they removed a large quantity of gravel from this supposedly rich pay streak, and left a sizeable amount of this gravel dumped by the sluice boxes at the time they left the premises (R. 137-9, 182).

Contrasted with appellees' tale of a supposed bonanza, we have the following undisputed physical facts of record:

(1) Paul Drazenovich, one of the original partners, quit the venture on August 6, 1942, *after* the discovery of the supposed bonanza (Pltfs' Ex. I). (Zukoev, after having his memory refreshed during a recess, testified that the discovery was made about July 20, 1942; Kupoff testified that it was made during the latter part of July or first part of August (R. 173-4, 178-9, 79-80); neither of them attempted to suggest that Drazenovich left before the pay streak was discovered). He transferred his interest in consideration of the remaining partners' agreement to assume his share of the partnership liabilities (Pltfs' Exs. I & M).

(2) Appellees were in straitened financial circumstances—their bank balance (as disclosed by their own

checkbook stubs—Pltfs' Ex. G)—dropped to \$29.12 on August 10, 1942, and continued in that status until after they left the premises. Their counsel admitted they were required to conduct sluicing and clean-up operations in order to obtain money to pay their men (R. 356, 363), and that they wanted to get as much money out of the mine as early as they possibly could (R. 399-400). They owed Stepovich for back royalty payments and for other bills, at least one of which Stepovich paid to a merchant on their behalf (Pltfs' Ex. H). Yet they never conducted another *official* clean-up following the August 2nd clean-up, although they supposedly were hauling gold-rich gravel from their pay streak, and, according to Zukoev, had sluiced over 500 yards of it (R. 181-2).

(3) The dump by the sluice boxes on which appellees had, by their own testimony, left a large amount of gold-rich gravel from the pay streak when they left the premises was in fact almost devoid of gold content. This was established by careful testing by two expert mining engineers retained by appellant to make independent tests of the premises (R. 293, 300-301, 317-18, 319-20). The testimony of these two experts was allowed in evidence without objection by appellees' counsel, although he subsequently successfully objected to the introduction of vials containing bits of gold—the result of their testing. However, the trial judge treated their oral testimony as having already been admitted into evidence and no instruction was given to the jury to disregard it (R. 332-4).

Some question might be raised with respect to the reliability of this evidence due to the span of time between the date appellees left the premises in August, 1942, and

the date the testing was done, in the fall of 1957. This lapse of time reduces the probative force of the results of testing only if the dump by its nature might have been affected by the lapse of time, or if extrinsic circumstances might have caused some change.

See:

II *Wigmore on Evidence* (3d ed.) Sec. 437.

Undisputed testimony by the two mining engineers established that the amount of gold in the dump and its position in the dump would not be affected by the passage of time or by weather conditions (R. 306-7, 323). In addition, the undisputed testimony of an officer of the mining company that took possession of the premises as lessee shortly after appellees' departure established that no mining operations had ever been conducted by them on the premises, and that the premises were at the date of trial in the same condition as when originally leased to them in 1942 (R. 110). One of the two mining engineers who did the testing for appellant did testify that he encountered two levels of deposits in the dump, which had been deposited not more than a year apart, and probably less (R. 322-3). This result could have been produced by appellees' own sluicing operations in 1942. Appellees' counsel took the position at one point in his argument that some of the dump had been created in 1941, prior to the time of appellees' operations (R. 399, 405), and that this explained the source of two layers in the dump. Even if this were the correct explanation, the testing of the upper portions of the dump (the results of appellees' operations) yielded only \$1.80 to \$2.04 per cubic yard

in gold values (R. 301, 320), which was, of course, far under appellees' claim of \$94.50 to \$189 per cubic yard.

(4) The fact that no mining operations have been conducted on the premises since appellees' departure (in spite of the supposedly rich nature of their find) is further proof that the physical facts of record are at variance with appellees' claim of having found a bonanza.

Appellees' counsel recognized these glaring discrepancies between his clients' testimony and the undisputed physical facts of record, and, accordingly, in his closing argument to the jury he sought to avoid these contradictions by restating the evidence in a manner inconsistent with the record facts and volunteering "facts" not in the record. Appellees' counsel stated, contrary to the record facts, that the pay streak was not discovered until a short time after August 8, 1942, after Paul Drazenovich had quit the venture (R. 402-3, 405). (Zukoev had testified, *after having his recollection refreshed during a recess*, that the discovery was made about July 20th (R. 178-9).) Appellees' counsel volunteered that if Drazenovich had been at the trial "he might tell you another story. He might tell you a story of threats and a gun and things that way." (R. 403). Appellees' counsel sought to avoid the findings of appellants' two mining engineers by stating, again contrary to the record facts, that appellees had sluiced practically all of the rich pay dirt dumped by them by the sluice boxes, and left very little, if any of the rich dirt there, so that the dump actually consisted of the results of appellees' earlier exploratory work, and/or an old dump from 1941 or before (R. 399-400, 404-5). (Not only had appellees testified that they

sluiced the results of their exploratory work to produce the amount of their three clean-ups, but they also testified that they left a large quantity of rich pay dirt on the dump when they left (R. 137-40, 181-2.) As if to tack down his points by recourse to passion (should the jury have remembered the facts of record), he appealed to the fact that Mrs. Stepovich was "down to her last yacht, her last Cadillac." (R. 400.)

Suggestions of counsel cannot, of course, take the place of evidence.

*United States v. Coal Cargo*, 11 F. 2d 805, 808 (D.C. E.D. Pa. 1924); affirmed, 11 F. 2d 809 (3d Cir. 1926); cert. den., 273 U.S. 696 (1926).

Certainly they cannot be substituted for record evidence which is embarrassing to appellees. Appellees had full opportunity to explain the circumstances of Paul Drazenovich's departure, and they failed to do so. Their failure to produce available evidence gives rise to the presumption that, if produced, the evidence would have been unfavorable to them.

See:

*Hann v. Venetian Blind Corp.*, 111 F. 2d 455, 459 (9th Cir. 1940);

*Brown v. Maryland Casualty Co.*, 55 F. 2d 159, 161 (8th Cir. 1932).

It is therefore clear from the undisputed physical evidence of record that appellees found no treasure trove, and that their testimony that they did was inherently improbable and should not have been credited. Not having found a rich pay streak, they suffered no damages even

if it could be said that they had been wrongfully evicted. In addition the foregoing evidence further demonstrates that appellees' claim was not proved—but was in fact disproved—by the evidence other than the testimony of the claimants. Consequently, appellant was entitled to have a verdict directed in her favor.

**C. Appellees' proof relating to damages is insufficient to support an award of substantial damages for loss of profits under the rules of law applicable to damages for wrongful eviction from mining leases.**

In *Anvil Mining Company v. Humble*, 153 U. S. 540, 549 (1894), the United States Supreme Court laid down the rule that in fixing damages for loss of profits where plaintiffs were prevented from completing a contract to mine iron ore, profits which are a mere matter of speculation cannot be made the basis of recovery, while profits which are reasonably certain may be allowed. The court upheld an award of damages for lost profits on the ground that there was testimony in the record to show the cost of mining each ton of ore, and also the amount of ore remaining in the mine. The amount per ton that plaintiffs were to receive from defendant for the ore removed was fixed by contract.

This result is in accordance with the general rule requiring a reasonable degree of certainty in fixing damages.

See:

15 Am. Jur., *Damages*, Secs. 20, 21.

In determining lost profits as a measure of damages, this Court has been particularly emphatic in requiring that



damages due to loss of profits be based on reliable evidence and not on speculation.

*Flintkote Company v. Lysfjord*, 246 F. 2d 368, 393-4 (9th Cir. 1957), cert. den. 355 U.S. 835 (1957);

*Wolfe v. National Lead Company*, 225 F. 2d 427, 433-4 (9th Cir. 1955), cert. den., 350 U.S. 915 (1955);

*Putnam v. Lower*, 236 F. 2d 561, 571-2 (9th Cir. 1956).

Where a lessee under a mining lease produces no reliable or reasonably certain evidence as to the quantity or value of the ores remaining in the mine, or that there would have been any profits, a judgment for substantial damages will be set aside as based wholly on speculation.

See:

*Smuggler-Union Mining Co. v. Kent*, 47 Colo. 320, 112 Pac. 223 (1910);

*Hoosac Mining & Milling Co. v. Donat*, 10 Colo. 529, 16 Pac. 157 (1887).

As the Colorado Supreme Court stated in *Smuggler-Union Mining Co. v. Kent*, *supra* (47 Colo. at 334, 112 Pac. at 228):

“... it is not surprising that plaintiffs in their testimony say they could have taken out ores of the value of at least \$900,000, and would have surely made \$200,000 profit during the remaining 18 months of their term, had not their possession been interfered with, notwithstanding they swear that during their six months' occupancy they removed and milled ores extracted by stopping on the vein, which, so far as it

had been exposed at all, was the result of the work of others, of the gross value of only \$5,000, and at a profit of \$3,500 to \$3,800. The jury returned a verdict for \$5,000 in favor of plaintiffs. It might just as well have been for \$250,000. There is no evidence at all upon which the verdict can rest. It is purely speculative. The estimate of plaintiffs' witnesses as to quantity and value, as well as the verdict of the jury, is conjectural—the result of guesswork. A judgment based on such a foundation cannot stand.”

To be substantial enough to sustain a jury verdict, evidence must not be vague, uncertain, incompetent or irrelevant and must carry the quality of proof and have the fitness to produce conviction.

See:

*United States v. Kerr*, 61 F. 2d 800, 803 (9th Cir. 1932);

*Pennsylvania Pulverizing Co. v. Butler*, 61 F. 2d 311, 314 (3d Cir. 1932).

Where lessees are operating a mine at a loss, only nominal damages may be recovered for a wrongful eviction.

See:

*Phenix Jellico Coal Co. v. Grant*, 136 Ky. 751, 125 S.W. 165 (1910);

58 C.J.S. *Mines and Minerals*, Sec. 174, p. 373.

In determining whether a mine has been operated at a profit, or whether it is a losing venture, the operating expenses must first be subtracted from revenues.

See:

*Butterfield v. Snively*, 60 Ohio App. 14, 19 N.E. 2d 284 (1937).

Applying these rules to the present case, it is clear that appellees failed to furnish any reliable basis for calculating lost profits.

In their complaint appellees alleged that they had left gold in the dump and sluice boxes valued at \$20,000, and, in addition, sought recovery of operating expenses in the amount of \$6791.29, and the balance as lost profits if they had been permitted to continue mining (R. 6-8).

It was clearly established from the record that placer deposits are extremely irregular, and that there is no certainty that a deposit will extend for more than a few feet unless intensive drilling operations are conducted to prove the extent of the deposit (R. 264, 266, 268-72, 313-16, 326-7). As there was no admissible evidence that any such tests had been made which shed light on the value, if any, of appellees' "pay streak," the claim for lost profits for future operations must be immediately rejected at the outset, and we are then left to determine what profit, if any, appellees lost by not being able to process the dump and clean-up the sluice boxes. Appellees are not in any event entitled to more than this as they did not show by competent evidence that their "pay streak" extended beyond the area being mined at the time of their departure from the premises. Any award based on the theory that the deposit extended for any distance would have to be based on the sheerest speculation.

Turning then to the value of the gold, if any, left, in the dump and sluice boxes, we are faced with a hopeless jumble of vague, conflicting estimates. Even if we assume that appellees' unverified estimates of the richness

of their deposit are accurate (a dubious assumption at best, considering their lack of qualifications to evaluate and their obvious interest in the outcome), we are still at sea as to exactly how rich the deposit was and how much was removed. Appellees' estimates as to value were extremely vague. Nick Kupoff estimated that values averaged 50 cents to \$1 a pan (R. 78-9). James Zukoev estimated the results as sometimes \$1 a pan, sometimes less, and sometimes more, and at one point he guessed that it "maybe" even averaged \$1.60 or \$1.80 a pan (R. 169-70, 173), but even appellees' own counsel did not give credence to this latter guess (R. 226, 274, 324, 382). Estimates as to the amount of gravel removed were even more unsatisfactory. Kupoff and Zukoev agreed generally that the dimensions of the area mined by them in the supposed pay streak was 60 or 62 feet by 12 feet by 6 feet (R. 78-9, 115, 170-2, 180) (Zukoev at one point gave the dimensions as 62 feet by 6 feet by 32 feet, but he later corrected this statement (R. 172, 180)). This would have amounted to 4464 cubic feet, or  $165\frac{1}{3}$  cubic yards. However, Kupoff testified that appellees removed somewhere around "four, five hundred" (unit of measurement unspecified) from the alleged pay streak (R. 80), and on cross-examination indicated that they had left either 200-300 yards or 300-400 yards of gravel from the pay streak dumped by the sluice boxes (R. 138-9). Zukoev testified that appellees had *sluiced* around 500 yards or more of the dirt from the pay streak, and yet when they left the premises, a large amount of gravel from the pay streak remained to be sluiced (R. 181-2). Faced with this vague and conflicting testimony, any decision by the jury as to the value of the

gold removed by appellees from their pay streak and left in the dump and sluice boxes was bound to be based on speculation and guess. Furthermore, we have no evidence with respect to the cost of sluicing the gravel left in the dump and cleaning up the sluice boxes so as to determine the net cost of appellees' operations. To permit a jury (or a court) to arrive at a verdict or judgment under these circumstances is to permit resort to the sheerest speculation.

As was aptly stated by the Eighth Circuit Court of Appeals in *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96, 102 (8th Cir. 1901):

“... Expected profits are, in their nature, contingent upon many changing circumstances, uncertain and remote at best. They can be recovered only when they are made reasonably certain by the proof of actual facts which present data for a rational estimate of their amount. The speculations and conjectures of witnesses who know no facts from which a reasonably accurate estimate can be made form no better basis for a judgment than the conjectures of the jury without facts....”

This is not merely a case of determining extent of damage by approximation after the relevant factors of value of ore, extent of area mineable, and cost of operations have been fairly well determined. The basic factors to be employed are themselves vague, conflicting and uncertain.

Under these circumstances, appellees were not entitled to a verdict for substantial damages in any event, even if there had been independent proof of wrongful eviction

and damages as required by Section 61-13-4, and even if the physical facts of record had supported appellees' claim.

---

## II

### **THE SIZE OF THE JURY'S VERDICT EVIDENCES A DISREGARD OF THE INSTRUCTIONS GIVEN BY THE TRIAL COURT, AND IS NOT SUPPORTED BY THE EVIDENCE.**

On October 26, 1957, following return of the jury's verdict, counsel for appellant made a motion for a directed verdict or for a new trial, which motion was denied by the District Court (see Appendix II to this brief).

Even if this court should conclude that there is independent evidence in the record sufficient to sustain a verdict for appellees without recourse to speculation, and that their testimony is not so inherently incredible and contrary to the physical facts of record as to have required the trial court to direct a verdict for appellant, the amount of the jury's verdict is still contrary to the instructions given, and is not supportable by the evidence.

As pointed out earlier in this brief (pages 6, 39), appellees failed to establish that the dimensions of their supposed pay streak extended beyond the area actually mined by them, and accordingly they would at most have been entitled to a verdict only for the gold content of the gravel which had been mined and removed to the dump and sluice boxes at the time appellees left the premises. In their complaint, appellees fixed the value of the gold left in the dump and sluice boxes at \$20,000. In view of the jury's verdict (\$26,802.12), and the amount of operat-

ing expenses claimed by appellees as damages in their complaint (\$6791.29), it appears that the jury followed appellees' complaint and awarded approximately \$20,000 for the gold in the dump and sluice boxes. This was patently in disregard of the court's instructions that in arriving at any award the jury must first deduct the amount of appellees' operating expenses and Mike Stepovich's  $33\frac{1}{3}\%$  royalty (Instructions R. 26-7). On doing so, it is clear that the jury could have awarded no more than \$8892.71 (after subtracting Stepovich's royalty in the amount of \$6667 and claimed operating expenses of \$6791.29 and making allowance for appellees' portion of the three clean-ups already made, or \$2350.67). The deduction of Stepovich's royalty was, of course, required by the terms of the lease, and the deduction of operating expenses was required by applicable judicial decisions.

See:

*Butterfield v. Snively, supra;*

*Phenix Jellico Coal Co. v. Grant, supra;*

*Anvil Mining Company v. Humble, supra;*

*Smuggler-Union Mining Co. v. Kent, supra.*

Nor is the amount of the jury's verdict supportable on any other theory. The highest valuation that the jury could conceivably have placed on the gold in the dump and sluice boxes was approximately \$31,248 (computed on the basis of an average value of \$1 per pan or \$189 per cubic yard, and a block of gravel 62 feet by 6 feet by 12 feet, or approximately  $165\frac{1}{3}$  cubic yards). After deducting Mike Stepovich's  $33\frac{1}{3}\%$  royalty (\$10,416) and appellees' alleged operating expenses (\$6791.29) and making due allowance for appellees' portion of the three clean-ups

already made (\$2350.67), the maximum verdict that the jury could have awarded in compliance with the court's instructions on *any* tenable theory was \$16,391.38.

Where a jury returns a verdict in disregard of a court's instructions or which is otherwise manifestly excessive on the basis of the record evidence, an appellate court will set the verdict aside, and this court has itself done so in the past.

See:

*Cobb v. Lepisto*, 6 F. 2d 128 (9th Cir. 1925);

*Virginian Ry. Co. v. Armentrout*, 166 F. 2d 400, 408 (4th Cir. 1948);

*Boyle v. Bond*, 187 F.2d 362, 363 (C.A.D.C. 1951).

The necessity for the exercise of such power in the proper administration of courts of justice was cogently set forth by Judge Parker in *Virginian Ry. Co. v. Armentrout*, *supra* (166 F. 2d at 408), when he stated:

“The power and duty of the trial judge to set aside the verdict under such circumstances is well established, the exercise of the power being regarded as not in derogation of the right of trial by jury but one of the historic safeguards of that right. *Smith v. Times Pub. Co.*, 178 Pa. 481, 36 A. 296, 35 L.R.A. 819; *Bright v. Eynon*, 1 Burr. 390; *Mellin v. Taylor*, 3 B.N.C. 109, 132 Eng.Reports 351. The matter was well put by Mr. Justice Mitchell, speaking for the Supreme Court of Pennsylvania in *Smith v. Times Pub. Co.*, *supra*, 178 Pa. 481, 36 A. 298, as follows: ‘The authority of the common pleas in the control and revision of excessive verdicts through the means of new trials was firmly settled in England before the foundation of this colony, and has always existed here without challenge under any of our constitutions.



It is a power to examine the whole case on the law and the evidence, with a view to securing a result, not merely legal, but also not manifestly against justice,—a power exercised in pursuance of a sound judicial discretion, *without which the jury system would be a capricious and intolerable tyranny*, which no people could long endure. This court has had occasion more than once recently to say that it was *a power the courts ought to exercise unflinchingly.*' (Italics supplied.)

To the federal trial judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require. *Aetna Casualty & Surety Co. v. Yeatts*, 4 Cir., 122 F. 2d 350.

The power of this court to reverse the trial court for failure to exercise the power, where such failure, as here, amounts to an abuse of discretion, is likewise clear."

In view of the discussion below at pages 45-47 of this brief, there is even less reason than usual for giving sanctity to the jury's verdict in this case.

---

### III

**THE VERDICT OF THE JURY WAS NOT ENTITLED TO ANY GREATER WEIGHT THAN THAT ACCORDED THE VERDICT OF AN ADVISORY JURY IN AN EQUITY CASE.**

The instant suit was brought under what is now Section 61-13-4 of Alaska Compiled Laws (1949) as a result

of the rejection by appellant of appellees' claim against Mike Stepovich's estate. Section 61-13-4, by its terms, contemplates a summary determination of rejected claims by a judge sitting without a jury. Although the section also contemplates by its terms that a jury may be called to determine the factual matters in dispute, the parties have no right to a trial by jury.

See:

*Esterly v. Rua*, 122 Fed. 609, 613 (9th Cir. 1903).

In the absence of an order for a jury trial entered by the court upon consent of both parties under Rule 39(c), any jury used in the action is advisory only.

*Co-Efficient Foundation v. Woods*, 171 F. 2d 691, 693-4 (5th Cir. 1948);

2 Barron & Holtzoff, *Federal Practice and Procedure*, Sec. 891, p. 596.

No such order was entered in this case (see Appendix III to this Brief), and the parties agreed, at most, to the use of a jury as an advisory jury. Therefore, on review before this court, the appeal is from the trial court's judgment as though no jury had been present.

See:

(*American*) *Lumbermens Mut. Cas. Co. v. Timms & Howard, Inc.*, 108 F. 2d 497, 500 (2d Cir. 1939); *Major v. Phillips-Jones Corp.*, 192 F. 2d 186, 189 (2d Cir. 1951); cert. den. 343 U.S. 927 (1952); 5 *Moore's Federal Practice* (2d ed.), Par. 39.10[3], p. 725.

Consequently, this court may review the judgment in question here as if the trial court had found the facts, and

reject the judgment if it is concluded to be clearly erroneous.

*Federal Rules of Civil Procedure*, Rule 52(a).

It is clear from the foregoing discussion in this brief that the judgment entered was in fact clearly erroneous.

---

### CONCLUSION.

This case illustrates in striking fashion why suits should not be allowed against decedents' estates based solely on the uncorroborated testimony of interested claimants. Under such circumstances, claimants may spin their tales of grievous damage without fear of contradiction, and the true story of what actually happened may never be told. In this case, even if we were to rely solely on appellees' story as it appears in the record, it is clear that the whole story as to what really transpired between the appellees and Mike Stepovich has not been accurately told. The transaction concerning the large tractor demonstrates that fact. Nick Kupoff flatly denied that appellees ever had any dealings with it, but James Zukoev admitted that they used it, and used it in a manner contrary to their agreement with Stepovich. The record even indicates at one point that appellees themselves filled the mine shaft full of water! (R. 185.) We do not pretend to know with certainty what in fact prompted Mike Stepovich to file a complaint against appellees, but it is only fair to assume from the record that he was acting to remove appellees from his premises because he felt they were surreptitiously cleaning up

the meager gold they had found in the sluice boxes, without accounting to him for his share. Perhaps he should have picked a different method of approach to the problem. But the fact that he did not does not justify an award of substantial damages to appellees for a golden bonanza that did not exist. Two wrongs do not make a right. Simple justice should prompt this court to reverse the judgment of the trial court and order the entry of a judgment dismissing appellees' complaint. The evidentiary requirements of Section 61-13-4 demand it.

Dated, San Francisco, California,

August 29, 1958.

RICHARD J. ARCHER,  
MARSHALL L. SMALL,  
MORRISON, FOERSTER, HOLLOWAY,  
SHUMAN & CLARK,  
*Attorneys for Appellant.*

**(Appendices I, II and III Follow.)**

## **Appendices.**



## Appendix I

### INFORMATION WITH RESPECT TO EXHIBITS MADE A PART OF THE RECORD.

| Identifi-<br>cation No.         | Exhibit<br>No.   | Description of Exhibit  | Record Reference    |                       |
|---------------------------------|------------------|---|---------------------|-----------------------|
|                                 |                  |   | Identifi-<br>cation | Offered &<br>Received |
| <b>I Plaintiffs' Exhibits:</b>  |                  |   |                     |                       |
| 1                               | A                | Mining lease  | 41                  | 42                    |
| 2                               | B                | Assignment of partnership interest<br>to Kitoff   | 52                  | 53-4                  |
| 3                               | C                | Assignment of partnership interest<br>to Kobak  | 52                  | 54                    |
| 4                               | D                | Time book   | 54                  | 58                    |
| 5-A                             | E-1              | Time book   | 59                  | 63                    |
| 5-B                             | E-2              | Time book   | 59                  | 63                    |
| 6                               | F                | Envelope containing miscellaneous<br>checks   | 68                  | 71                    |
| 7                               | G                | Check book with stubs   | 71                  | 72                    |
| 8                               | H                | Statement, dated August 8, 1942,<br>presented by Stepovich to plaintiffs  | 73                  | 73                    |
| 9                               | I                | Assignment of partnership interest by<br>Drazenovich to Kupoff and Zukoev   | 75                  | 75                    |
| 10                              | J                | Creditors' claim  | 75                  | 77                    |
| 11                              | K                | Complaint filed and Summons ob-<br>tained by Stepovich  | 81                  | 82-3                  |
| 12                              | L                | Writ of attachment  | 83                  | 83                    |
| 13                              | M                | Memorandum agreement by partners<br>of North Star Mining Company<br>promising Drazenovich to assume<br>the debts of the partnership | 83                  | 84                    |
| 14                              | N                | Letter from Collins to Kupoff   | 84                  | 84                    |
| 15                              | O                | Minute order in case No. 4950 pro-<br>viding for a nonsuit  | 85                  | 85                    |
| 17                              | P                | Letter from Stepovich to U. S. Mar-<br>shal dispensing with services of<br>watchman   | 86                  | 87                    |
| 18                              | Q                | Writ of attachment  | 87                  | 87                    |
| 21                              | R-1, 2,<br>3 & 4 | Notices of attachment   | 97                  | 98                    |
| 22                              | S                | Bank book and deposit slip  | 98                  | 99                    |
| 20                              | T                | File in case No. 4950 (Stepovich's<br>suit vs. Zukoev, et al.)  | 97                  | 114                   |
| 16                              | U                | Marshal's docket sheet in case 4950   | 85                  | 115                   |
| 23                              | V                | Map of claim  | 151                 | 154                   |
| 24                              | W                | Map of claim  | 154                 | 154-5                 |
| <b>II Defendant's Exhibits:</b> |                  |   |                     |                       |
| B                               | 1                | Photograph of camp  | 240                 | 241                   |
| E                               | 4                | Pictures of dump  | 294                 | 295                   |

## Appendix II

---

[Title of Court and Cause.]

### MOTION FOR A DIRECTED VERDICT OR FOR A NEW TRIAL.

The defendant, having moved for a directed verdict at the close of all of the evidence, which motion was not granted, hereby moves for the entry of judgment in accordance with her motion for the reason that the evidence introduced by the plaintiffs is insufficient in law to form the basis of a verdict for the plaintiffs.

In the alternative, if the foregoing motion is not granted, the defendant moves for an order vacating and setting aside the verdict of the jury, and granting defendant a new trial, for each of the following reasons affecting materially the substantial rights of the defendant:

1. The court erred in rejecting relevant and competent evidence offered by the defendant which evidence consisted of testimony of plaintiffs in the prior trial.
2. The verdict is not sustained by sufficient evidence.
3. The verdict is contrary to the weight of the evidence.
4. There is no sufficient or substantial evidence to support the amount of the jury's verdict.
5. The amount of the verdict is against the weight of the evidence.
6. There is not sufficient evidence to justify an award of damages for loss of profits and the



court erred in instructing the jury that they could return a verdict based on loss of profits.

7. The amount of the verdict is excessive and appears to have been given under the influence of passion and prejudice.
8. The argument of counsel was improper in that it contrasted the financial condition of plaintiffs and defendant, introduced facts not in the record, and was an appeal to passion and prejudice.

[Title of Court and Cause.]

### HEARING CONTINUED

Vernon D. Forbes, presiding.

Came the respective counsel as heretofore.

Mr. Cole presented rebuttal argument on the defendant's Motion for a New Trial.

The Court being fully advised in the matter, it was ORDERED that the Motion for a directed Verdict and for a New Trial be denied.

Feb. 27, 1958

Entered in Court Journal

No. 63, Page 191

### Appendix III

---

THIS IS TO CERTIFY, That, at the time cause No. 5395, entitled Kupoff et al v. Stepovich, etc., was filed in the above-entitled Court, the Federal Rules of Civil Procedure did not apply to Alaska and, as a consequence, no demand for a jury trial was filed. This action was filed originally on October 15, 1945, and the Rules of Civil Procedure were applicable to Alaska July 18, 1949. Law cases were tried by Jury unless there was a Stipulation made orally or filed that a jury was waived.

As indicated by the attached copy of the minute order of the first day of trial herein, there was no opposition by either side to a jury trial.

WITNESS my hand and the seal of the above-entitled Court this 26th day of July, 1958.

John B. Hall

Clerk of Court

[Title of Court and Cause.]

## TRIAL BY JURY

Plaintiff Nick Kupoff was present and represented by Warren A. Taylor; the defendant was represented by Mike Stepovich and Julien A. Hurley.

Respective counsels examined prospective Jurors as to their qualifications to set as trial Jurors in this cause and exercised their challenges for cause and their peremptory challenges.

At 12 N. the Court duly admonished the Jury and continued the trial of this cause until 2:00 p.m.

Dec. 28, 1948

Entered in Court Journal

No. 38, page 9

## ORDER

IN THE MATTER OF SETTING CIVIL CASES FOR TRIAL

With the consent of the respective counsels in the following listed causes, it was ORDERED that the trial of each case listed be set on the date following its title, to wit:

5395 Kupoff et al vs

Stepovich, etc. 10:00 a.m., December 21, 1948

Nov. 5, 1948

Entered in Court Journal

No. 37, page 234



**No. 15,962**  
**United States Court of Appeals**  
**For the Ninth Circuit**

---

VUKA RADOVICH STEPOVICH, Executrix of the  
Estate of Mike Stepovich, deceased,

*Appellant,*

vs.

NICK KUPOFF, JAMES ZUKOEV, MIKE KITOFF,  
and NICK KABAK, a partnership doing  
business as North Star Mining Company,

*Appellees.*

**BRIEF FOR APPELLEES.**

---

WARREN A. TAYLOR,

WARREN WM. TAYLOR,

320 Chena Building, Fairbanks, Alaska,

*Attorneys for Appellees.*

FILED

OCT 32 1958

PAUL P. O'BRIEN, CLERK



## **Subject Index**

---

|                             |             |
|-----------------------------|-------------|
|                             | <b>Page</b> |
| Statement of the case ..... | 1           |
| Argument .....              | 2           |

### **I.**

|  |   |
|--|---|
| (A) The sufficiency of the evidence introduced in addition to that of the testimony offered by the appellees .....                             | 2 |
| (B) Appellees offered ample competent proof to furnish a basis for computing the damages resulting in judgment in favor of the appellant ..... | 2 |
| Distinguishing authorities cited by appellant ....   | 5 |

### **II.**

|  |    |
|--|----|
| Appellees' proof relating to damages was sufficient in all respects to support the award for damages ..... | 6  |
| Conclusion .....   | 11 |

---

## **Table of Authorities Cited**

---

|   |              |
|---|--------------|
|   | <b>Pages</b> |
| Anvil Mining Company v. Humble, 153 U.S. 540 .....    | 10           |
| Eastman Co. v. Southern Photo Co., 273 U.S. 359 ..... | 6, 7         |
| Franklin v. Northrup, 215 P. 494 .....                | 3            |
| In Re Berger's Estate, 25 P. 2d 138 .....             | 5            |
| In Re Hattrem's Estate, 135 P. 2d 775 .....           | 2            |
| In Re Johnson's Estate, 164 P. 2d 886 .....           | 3            |
| In Re Millon's Estate, 61 P. 2d 1030 .....            | 6            |

|  | Page |
|--|------|
| Krikorian v. Dailey, 197 S.E. 442 .....  | 4    |
| Kupoff v. Stepovich, 184 F. 2d 705 .....   | 1, 2 |
| Leader Clothing Company v. Fidelity & Casualty Co. of<br>N.Y., 237 F. 2d 7 ..... | 8    |
| Rosinski v. Whiteford, 184 F. 2d 700 .....                                       | 5    |
| Story Parchment Co. v. Paterson Co., 282 U.S. 555 .....                          | 7    |
| Student's Book Company v. Washington Book Company,<br>232 F. 2d 49 .....         | 8    |
| Twin Lakes H. Gold Min. Syndicate v. Colorado M. Ry. Co.,<br>27 P. 258 .....     | 9    |



No. 15,962

**United States Court of Appeals  
For the Ninth Circuit**

---

VUKA RADOVICH STEPOVICH, Executrix of the  
Estate of Mike Stepovich, deceased,

*Appellant,*

vs.

NICK KUPOFF, JAMES ZUKOEV, MIKE KITOFF,  
and NICK KABAK, a partnership doing  
business as North Star Mining Company,

*Appellees.*

---

**BRIEF FOR APPELLEES.**

---

**STATEMENT OF THE CASE.**

The statement of appellant's brief substantially recites the facts of the case except in significantly omitting to advise the court that the appellees did not leave the premises as alleged by them purely as a result of a suit by Stepovich, but were evicted by a marshal's execution, resulting from a non-founded suit instigated by Stepovich.

All of these facts have been fully covered on a prior appeal and fully discussed before this court in such appeal. (See *Kupoff v. Stepovich*, 184 F. 2d, 705.)

**ARGUMENT.**

The appellees will confine the argument solely to the two points raised by the appellant.

---

**I.**

- (A) **THE SUFFICIENCY OF THE EVIDENCE INTRODUCED IN ADDITION TO THAT OF THE TESTIMONY OFFERED BY THE APPELLEES.**
- (B) **APPELLEES OFFERED AMPLE COMPETENT PROOF TO FURNISH A BASIS FOR COMPUTING THE DAMAGES RESULTING IN JUDGMENT IN FAVOR OF THE APPELLANT.**

Appellees introduced sufficient independent evidence entitling them to a verdict and judgment.

The Alaskan Statute governing decedents' estates does not preclude an interested party from testifying except that such testimony must in some manner be corroborated by some species of proof, all of which had been done in this case, as is borne out by the record on appeal.

The partial discussion having reference to the statute has been made in the prior opinion of this court in *Kupoff v. Stepovich* (supra). The sufficiency of such proof has been tested in numerous prior decisions, including the Oregon courts from which the Alaska Statute has evolved. In the case of *In Re Hat-trem's Estate*, 135 P. 2d 775, 777, where a cause of action has been instituted and the claim was rejected for attorney's fees against the estate of the deceased, the court, in commenting on the competency and sufficiency of independent proof, stated as follows:

“By reverting to the language of the statute, it will be seen that it was only ‘the testimony of the claimant’ which is excluded from the category of corroborative proof; in fact, it is ‘the testimony of the claimant’ which requires corroboration. Applying the rule of *expressio unius est exclusio alterius*, it is evident that all species of evidence, other than ‘the testimony of the claimant,’ is competent, satisfactory corroborative proof. \* \* \*.”

In the case of *In Re Johnson's Estate*, 164 P. 2d, 886, where the construction and the liberality allowed by the court with respect to competency of witnesses in regard to claim against estates, the court stated as follows:

“\* \* \* Our statute provides that no claim which has been rejected by an executor or administrator shall be allowed by any court ‘except upon some competent satisfactory evidence other than the testimony of the claimant’. Section 19-704, O.C.L.A. Competent corroborative proof, therefore, includes ‘all species of evidence, other than “the testimony of the claimant”.’ *In re Hat-trem's Estate* (supra). The law of Oregon is liberal in respect of the competency of witnesses, and effects no exclusion either of parties or ‘other persons who have an interest in the event’. Section 3-102, O.C.L.A. Cf *Barton v. Dyer*, 38 Idaho 1, 220 P. 488.”

In the case of *Franklin v. Northrup*, 215 P. 494, where the claimant attempted to spell out an implied promise to pay for rendition of services, the Supreme

Court of Oregon, at page 499, citing the specific section and numerous decisions, stated as follows:

“Defendant contends that the testimony of plaintiff relating both to her claim for services and to her claim for money expended for the support of the deceased lacks the corroboration required by statute, and in support of that contention cites section 1241 Or. L.; *Goltra v. Penland*, 45 Or. 254, 77 Pac. 129; *Consort v. Andrews*, 61 Or. 483, 123 Pac. 46.

“Section 1241, Or. L., directs:

\* \* \* ‘That no claim which shall have been rejected by the executor or administrator \* \* \* shall be allowed by any court, referee, or jury, except upon some competent or satisfactory evidence other than the testimony of the claimant.’

“As to the facts and circumstances and the acts and conduct of the parties upon which plaintiff relies to raise an implied promise of the decedent to pay for services performed by plaintiff, the testimony of plaintiff was sufficiently corroborated to warrant a finding by the trial court of an implied contract between plaintiff and deceased, obligating the latter to pay plaintiff the reasonable worth of the services of value performed by plaintiff in behalf of decedent.”

The case of *Krikorian v. Dailey*, 197 S.E. 442 (449) is particularly applicable in that there is some similarity in the factual aspects of the case. The action involved an eviction of a tenant by a landlord and a suit for damages by the tenant. The court, in construing a very similar statute in effect in the State of Virginia, stated as follows:

“\* \* \* No universal rule can be applied. Each case turns upon its own facts.

“\* \* \* The statute only requires that ‘there should be such corroboration as would confirm and strengthen the belief of the jury in the testimony’, of such adverse witnesses. *Burton’s Ex’r v. Manson*, 142 Va. 500, 129 S.E. 356, 359; *Davies v. Silvey*, 148 Va. 132, 138 S.E. 513; *Cannon v. Cannon*, 158 Va. 12, 163 S.E. 405. \* \* \*”

The same statute, being tested in the District of Columbia, and having been passed on for comment by the United States Court of Appeals for the District of Columbia, as reported in the case of *Rosinski v. Whiteford*, 184 F. 2d 700 (p. 701), is amply persuasive of the proposition that any corroborative evidence is sufficient to meet the requirements of the statute. We quote:

“\* \* \* ‘It is not necessary that corroborative evidence required by this statute be sufficient to support a judgment.’ *Shenandoah Valley Nat. Bank v. Lineburg*, 179 Va. 734, 739, 20 S.E. 2d 541, 544. We agree with the Virginia court. We think the statute permits a judgment based essentially on the survivor’s testimony if there is other evidence from which reasonable men might conclude that his testimony is probably true. \* \* \*”.

#### **Distinguishing authorities cited by appellant.**

It is worthwhile to call attention to some of the cases cited by the appellant which are distinguishable in the following respects:

*In Re Berger’s Estate*, 25 P. 2d, 138.

This particular case involved a partnership and was totally devoid of any species of corroborative proof.

*In Re Millon's Estate*, 61 P. 2d, 1030.

This case, quoted by appellant, involved a board and room claim and the testimony was confined strictly to that of the claimant and totally absent of any other facts from which any corroboration could either be implied or inferred.

---

## II.

### APPELLEES' PROOF RELATING TO DAMAGES WAS SUFFICIENT IN ALL RESPECTS TO SUPPORT THE AWARD FOR DAMAGES.

The case of *Eastman Co. v. Southern Photo Co.*, 273 U.S. 359 (p. 379), involved a suit brought against the corporation for the injury to the plaintiff's business, and the question of determining damages in the absence of a precise rule was fully discussed by the court. The court has stated the sound principle that where a wrong has been committed, particularly one occasioned by the defendant, recovery will not be precluded because damages cannot be established with a scientific precision. Quoting:

“\* \* \* ‘Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate.’ This, we think, was a correct statement of the applicable rules of law. Furthermore, a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not en-

titled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible. *Hetel v. Baltimore & Ohio R.R.*, 169 U.S. 26, 39. And see *Lincoln v. Orthwein* (C.C.A.), 120 Fed. 880, 886.

“We conclude that plaintiff’s evidence as to the amount of damages, while mainly circumstantial, was competent; and that it sufficiently showed the extent of the damages, as a matter of just and reasonable inference, to warrant the submission of this question to the jury. The jury was instructed, in effect, that the amount of the damages could not be determined by mere speculation or guess, but must be based on evidence furnishing data from which the amount of the probable loss could be ascertained as a matter of reasonable inference. And the questions as to the amount of the plaintiff’s damages having been properly submitted to the jury, its determination as to this matter is conclusive.”

The same doctrine is followed in a somewhat later decision, in the case of *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555 (p. 564) where the defendants raised a question that damages had been speculatively indulged in. The court, in following the earlier reasoning in the *Eastman* case, among other things, upheld the trial court’s instructions, which were as follows:

“ ‘Juries are allowed to act upon probable and inferential, as well as direct and positive proof. And when, from the nature of the case, the amount of the damages can not be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before

the jury all the facts and circumstances of the case having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit.' ”.

In the case of *Student's Book Company v. Washington Book Company*, 232 F. 2d, 49, in an action for damages based on alleged book sales to plaintiff's competitors, at preferential prices in violation of the Robinson-Patman Act, the Circuit Court of Appeals for the District of Columbia, in commenting on the barometer used in arriving at their damages, stated as follows:

“There is, of course, no accurate way of determining the amount of appellant's loss due to competition as against the amount due to discrimination. The ‘rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.’ . . .

“The problem is not a new one. In damage suits brought under the antitrust laws, the Supreme Court has held that the nature of the subject matter is such that the jury must be allowed to base its determination of damages upon ‘probable and inferential’ proof.”

In the case of *Leader Clothing Company v. Fidelity & Casualty Co. of N.Y.*, 237 F. 2d 7, in determining the loss covered by an insurance policy and the method of establishing damages, the court stated:



“When it is once established with certainty that a loss covered by the policy has occurred, it is not necessary to a recovery that the amount must be proved with mathematical accuracy, where that is impossible. Where, as here, the amount of the damages is difficult of ascertainment, as said by the Supreme Court, it would be a perversion of justice to deny all relief to the injured person under such circumstances. It is enough if there is a basis for a reasonable inference as to the extent of the damages.”

A reading of the authorities clearly indicates the particular trend that where a party has been wronged, the failure to establish damages with the precise measurement of a yardstick is not a bar to recovery.

In the instant cause tried before the court the plaintiff did, however, fully, abundantly and amply establish values, actual physical losses by virtue of having been ousted prior to the termination of the lease, and has evolved a denifite guide under the careful instructions of the court for the jury to draw such direct inferences based upon the testimony, to arrive at the verdict.

The case cited by the appellant, *Twin Lakes H. Gold Min. Syndicate v. Colorado M. Ry. Co.*, 27 P. 258, holds clearly in favor of the appellees and in support of the appellee's contention the following excerpt is quoted from such opinion:

“\* \* \* Here there was no question in regard to the character. Its character as mineral land was conceded. It was so regarded in the contract, and recognized as being actually occupied and

worked as placer mines. But such conclusive characterization did not fix its value. It might, as mineral land, be worth no more than five dollars per acre, the price fixed by law; it might be worth thousands. What the value was, was the question to be determined by the jury from the evidence. \* \* \*".

In the case of *Anvil Mining Company v. Humble*, 153 U.S. 540, 549, cited by appellant and characterized as the determining case in laying down the rules in fixing damages in mining cases, intended as conclusive authority for the appellant, bears out a contrary reasoning. The court there stated as follows:

“ ‘If the jury find from the evidence that the plaintiffs were in good faith endeavoring to carry out and perform said contract according to its terms, and the defendant wantonly or carelessly and negligently interfered with and hindered and prevented the plaintiff in such performance to such an extent as to render the performance of it difficult, and greatly decrease the profits which the plaintiff would otherwise have made, then and in such case such interference was unauthorized and illegal and would have justified the plaintiffs in abandoning the contract, and would have entitled them to recover such damages as they actually suffered by being hindered and prevented from performing such contract.’ ”

“\* \* \* A party who engages to do work has a right to proceed free from any let or hindrance of the other party, and if such other party interferes, hinders, and prevents the doing of the work to such an extent as to render its performance difficult and largely diminish the profits, the first

may treat the contract as broken, and is not bound to proceed under the added burdens and increased expense. It may stop and sue for the damages which it has sustained by reason of the non-performance which the other has caused."

"These are all the questions that we deem it important to consider. We have examined the record very carefully, and find nothing in the rulings of the court of which the defendant can justly complain; and while, in view of the conflicting testimony, there is room for difference of opinion as to what the facts really were, there was testimony which, in amount and character, was sufficient to uphold the verdict of the jury, and, of course, under those circumstances, its determination is conclusive upon those questions of fact. The judgment will be *Affirmed*."

The court below very carefully instructed the jury to award the plaintiffs no speculative damages, no anticipated losses or profits—to allow nothing which may appear conjectural or speculative. (Tr. pp. 27-28.)

The jury's verdict could only have been arrived at after deliberation and study of the testimony as offered and based solely upon such testimony.

---

### CONCLUSION.

It is clearly apparent that the defendant has evicted these plaintiffs, breached the lease, precluded the plaintiffs from pursuing operations upon realizing that further exploration of the leased area was prov-

ing fruitful, and appellant thus became liable for the consequential damages.

The judgment should, therefore, be affirmed.

Dated, Fairbanks, Alaska,

October 15, 1958.

Respectfully submitted,

WARREN A. TAYLOR,

WARREN WM. TAYLOR,

By WARREN A. TAYLOR,

*Attorneys for Appellees.*

No. 15,962

United States Court of Appeals  
For the Ninth Circuit

---

VUKA RADOVICH STEPOVICH, Executrix of the  
Estate of Mike Stepovich, deceased,

*Appellant,*

vs.

NICK KUPOFF, JAMES ZUKOEV, MIKE KITOFF,  
and NICK KABAK, a partnership doing  
business as North Star Mining Company,

*Appellees.*

REPLY BRIEF FOR APPELLANT.

---

RICHARD J. ARCHER,

MARSHALL L. SMALL,

MORRISON, FOERSTER, HOLLOWAY,

SHUMAN & CLARK,

Crocker Building, San Francisco 4, California,

*Attorneys for Appellant.*

FILED

NOV - 5 1958

PAUL P. O'BRIEN, CLERK



## Subject Index

---

|   | Page |
|---|------|
| (1) Appellees were required by the Alaskan statute to present a prima facie case independent of their own testimony in order to obtain a judgment against a decedent's estate | 2    |
| (2) Appellees have failed to show by evidence independent of their own testimony that they were in fact damaged at all  | 3    |

---

## Table of Authorities Cited

---

| Cases   | Pages |
|---|-------|
| Franklin v. Northrup, 107 Ore. 537, 215 Pac. 494 (1923)                           | 5, 6  |
| In re Fisher's Estate, 128 Ore. 415, 274 Pac. 1098 (1929)                         | 4     |
| In re Pottratz Estate, 158 Ore. 625, 77 P.2d 436 (1938)                           | 5     |
| In re Stoll's Estate, 188 Ore. 682, 217 P.2d 595 (1950)                           | 5     |
| Jacobson v. Holt, 121 Ore. 462, 255 Pac. 901 (1927) .....                         | 5     |
| Littlepage v. Security Savings & Trust Co., 137 Ore. 559, 3 P.2d 752 (1931) ..... | 5     |
| Wagner v. Savage, 195 Ore. 128, 244 P.2d 161 (1952)                               | 5     |

## Statutes

|  |      |
|--|------|
| Alaska Compiled Laws Annotated (1949), Section 61-13-4                   | 1, 2 |
| D. C. Code, Section 14-302 .....   | 3    |
| Va. Code (1919), Section 6209 (now Va. Code (1950), Section 8-286) ..... | 2    |

## Texts

|  |   |
|--|---|
| 21 A.L.R. 2d 1013, 1017-18, 1022 .....     | 3 |
| 21 Oregon Law Review 218, 221 (1938) ..... | 3 |





No. 15,962

**United States Court of Appeals**  
**For the Ninth Circuit**

---

VUKA RADOVICH STEPOVICH, Executrix of the  
Estate of Mike Stepovich, deceased,

*Appellant,*

vs.

NICK KUPOFF, JAMES ZUKOEV, MIKE KITOFF,  
and NICK KABAK, a partnership doing  
business as North Star Mining Company,

*Appellees.*

---

**REPLY BRIEF FOR APPELLANT.**

---

The Brief for Appellees filed herein merits little by way of response. It studiously avoids any discussion of the facts of record and makes no effort to point out in what respects Appellees' case is in any way sustained by evidence independent of their own testimony, as required by Section 61-13-4 of Alaska Compiled Laws Annotated (1949). Furthermore, the brief completely ignores several of the points raised in Appellant's opening brief (such as the inherent improbability of Appellees' testimony and the fact that it is contrary to the physical facts of record, the unsupportable size of the jury's verdict, and the weight to which such verdict is entitled), and these points must therefore be deemed to have been conceded.

Counsel for Appellant deem it necessary merely to re-emphasize the following in answer to the Brief for Appellees:

**(1) APPELLEES WERE REQUIRED BY THE ALASKAN STATUTE TO PRESENT A PRIMA FACIE CASE INDEPENDENT OF THEIR OWN TESTIMONY IN ORDER TO OBTAIN A JUDGMENT AGAINST A DECEDENT'S ESTATE.**

As pointed out at pages 12-15 of Appellant's opening brief, Section 61-13-4 of Alaska Compiled Laws Annotated was borrowed from a similar provision in the Oregon statute, which has been rigorously construed to require a claimant against a decedent's estate to present a complete prima facie case *independent of his own testimony*. Appellees' brief at pages 4-5 thereof suggests that all that is required is some corroboration of Appellees' testimony, and that such corroborative evidence need not itself be sufficient to support a judgment. As authority for this proposition, Appellees cite a Virginia case and a District of Columbia case. These cases were construing statutes which provided as follows:

“In an action or suit by or against a person who, for any cause, is incapable of testifying, or by or against the \* \* \* executor, administrator, heir or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony; \* \* \*.”

Sec. 6209, Va. Code 1919 (now Sec. 8-286, 1950 Va. Code).

“In any civil action \* \* \* against the \* \* \* representative of a deceased person \* \* \* no judgment or decree shall be rendered in favor of the plaintiff founded on the uncorroborated testimony of the plain-

tiff \* \* \* as to any transaction with or action, declaration or admission of the deceased \* \* \* person; \* \* \*.”

D. C. Code Sec. 14-302.

These statutes merely precluded the rendition of a judgment against an estate founded on the *uncorroborated* testimony of an interested party. These statutes did not contain the more rigorous requirement of the Alaskan and Oregon statutes that a claim against an estate cannot be allowed except upon some competent or satisfactory evidence *other than the testimony of the claimant*. The distinction between these two types of statutes has been clearly recognized in an exhaustive annotation on the subject.

See

21 *A.L.R.* 2d 1013, 1017-18, 1022.

See also

21 *Oregon Law Review*, 218, 221 (1938).

It is clear that decisions construing the Virginia and District of Columbia type of statute have no application here.

Furthermore, Appellees failed to produce sufficient independent corroborative evidence to satisfy even the Virginia and District of Columbia type of statute. The lack of any reference in their brief to any such independent corroborative evidence in the Record clearly underscores that failure.

---

**(2) APPELLEES HAVE FAILED TO SHOW BY EVIDENCE INDEPENDENT OF THEIR OWN TESTIMONY THAT THEY WERE IN FACT DAMAGED AT ALL.**

At pages 6-9 of their brief, Appellees cite certain cases for the proposition that difficulty of proof will not defeat

recovery where a plaintiff has shown that he has in fact sustained injury. However, these cases make clear that plaintiff must prove the *fact* of damage before he is entitled to prove the *amount* of damage. The fact that damage has resulted is one of the essential elements which a claimant against an estate must prove by independent evidence in order to obtain a judgment under the Oregon statute.

See

*In re Fisher's Estate*, 128 Ore. 415, 422, 274 Pac. 1098, 1100-1101 (1929).

In the present case Appellees have not proved by evidence independent of their own testimony that they were in fact damaged, as they have not proved by competent evidence that they had in fact discovered a valuable "pay streak". Indeed, the evidence of record in this case indicates that Appellees had been operating the mine at a loss prior to their removal from the premises, and hence the most that they were deprived of was the opportunity to continue to operate an unprofitable venture. Accordingly, the cases cited by Appellees are inapplicable.

Where a claimant has proved the *fact* of damage by independent evidence, a few isolated Oregon cases have permitted proof of the *amount* of damage without corroboration where the amount of damage was measured by the value of services rendered to an estate by a housekeeper or nurse, and where such value was capable of being fixed by opinion evidence which was (1) as readily accessible to the estate as it was to the claimant, and (2) as readily accessible to the executor as it was to the decedent in his lifetime.

See

*Franklin v. Northrup*, 107 Ore. 537, 552-3, 215 Pac. 494, 500 (1923);

*Littlepage v. Security Savings & Trust Co.*, 137 Ore. 559, 3 P.2d 752 (1931);

*In re Stoll's Estate*, 188 Ore. 682, 696-7, 217 P.2d 595, 599 (1950).

Other Oregon cases have refused to recognize even this limited exception.

See

*In re Pottratz Estate*, 158 Ore. 625, 77 P.2d 436 (1938);

*Jacobson v. Holt*, 121 Ore. 462, 468, 255 Pac. 901, 903 (1927);

*Wagner v. Savage*, 195 Ore. 128, 139-40, 244 P.2d 161, 166 (1952).

Even those cases which have recognized the exception still recognize that all material elements of a claimant's cause of action, including fact of damage, must be proved by independent evidence, and at most merely permit a limited exception to the usual rule that a claimant must independently corroborate his estimate of value in those unique cases where the estate is laboring under no handicaps in producing rebuttal evidence. This limited exception would not have been applicable here even if Appellees *had* produced independent proof of the fact that they were damaged, as the evidence as to the results of Appellees' pannings and the actual worth—or worthlessness—of their supposed bonanza was not as readily accessible to Appellant as it was to Appellees, nor was such evidence

as readily accessible to Appellant as it presumably was to Mike Stepovich while he was alive.

See

*Franklin v. Northrup*, 107 Ore. 537, 553, 215 Pac. 494, 500 (1923).

If Appellees had in fact been deprived of a rich pay streak by Mike Stepovich, they had ample time to assert their claim during his lifetime when he presumably would have been able to testify as to the worth of their claim. Yet they did not even bother to counterclaim in the suit he had brought against them. Instead they chose to wait until after his death—long after they had left the premises—before filing their claim. The policy of the Alaskan and Oregon statutes precludes Appellees from delaying to assert their claim in such manner, and then using their own interested testimony—without any corroboration—to line their pockets at the expense of an estate.

For the reasons set forth in Appellant's opening brief, it is respectfully submitted that the judgment of the trial court should be reversed and the Appellees' complaint should be dismissed.

Dated, San Francisco, California,  
November 5, 1958.

RICHARD J. ARCHER,  
MARSHALL L. SMALL,  
MORRISON, FOERSTER, HOLLOWAY,  
SHUMAN & CLARK,  
*Attorneys for Appellant.*

No. 15965 ✓

# UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES BLAIR,

*Appellant,*

vs.

ROBERT A. HEINZE, Warden of the  
California State Prison at Folsom,

*Appellee.*

## APPELLEE'S BRIEF

Appeal From the United States District Court for the  
Northern District of California, Northern Division

EDMUND G. BROWN  
Attorney General of the  
State of California

DORIS H. MAIER  
Deputy Attorney General of the  
State of California

GAIL A. STRADER  
Deputy Attorney General of the  
State of California

Library and Courts Building  
Sacramento 14, California

*Attorneys for Appellee*

printed in CALIFORNIA STATE PRINTING OFFICE

FILED

JUN - 6 1958

PAUL P. O'BRIEN, CLERK





## TOPICAL INDEX

|  | Page |
|--|------|
| STATEMENT OF THE CASE-----   | 1    |
| ARGUMENT -----   | 4    |
| I. The District Court Properly Denied the Appellant's Ap-<br>plication to File His Petitions for Writ of Habeas Corpus<br>in Forma Pauperis -----  | 4    |
| (a) The District Court Properly Considered the Merits<br>of the Petitions in Exercising Its Discretion Under<br>Title 28 U. S. C. § 1915-----      | 5    |
| II. The Petitioner Has Failed to Exhaust His State Remedies<br>and Has Not Shown Exceptional Circumstances Which<br>Will Excuse Such Failure ----- | 9    |
| III. The Underlying Allegations of the Appellant's Petition on<br>the Merits Do Not State a Justiciable Federal Question---                        | 14   |
| (a) The Legality of Appellant's Arrest-----  | 15   |
| (b) The Appellant's Plea of Guilty-----  | 15   |
| (c) The Sufficiency of the Allegations of the Informa-<br>tion -----   | 16   |
| CONCLUSION -----   | 21   |

## TABLE OF AUTHORITIES CITED

### CASES

|  |                |
|--|----------------|
| Breithaupt v. Abram, 352 U. S. 432, 77 S. Ct. 408, 1 L. Ed. 2d 448     | 15             |
| Cole v. Arkansas, 333 U. S. 196, 68 S. Ct. 514, 92 L. Ed. 644          | 19             |
| Darr v. Burford, 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761           | 10, 13, 14, 16 |
| Ex parte Hawk, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572             | 10, 14         |
| Ex parte Hull, 312 U. S. 546, 61 S. Ct. 640, 85 L. Ed. 1034            | 21             |
| Higgins v. Steele, 195 F. 2d 366                                       | 5, 6           |
| In re Basham, 24 Cal. App. 2d 285, 74 P. 2d 781                        | 15             |
| In re Berry, 43 Cal. 2d 838, 279 P. 2d 18                              | 15             |
| In re Blair, California Supreme Court, Crim. No. 6015                  | 3, 11          |
| 6044   | 3, 11          |
| 6052   | 3, 13          |
| In re Razutis, 35 Cal. 2d 532, 219 P. 2d 15 (Cert. Den. 340 U. S. 842) | 15             |
| In re Tedford, 31 Cal. 2d 693, 192 P. 2d 3 (Cert. Den. 335 U. S. 847)  | 15             |
| Lyle v. Eidson, 182 F. 2d 344 (Cert. Den. 340 U. S. 837)               | 16             |
| Meek v. City of Sacramento, 132 F. Supp. 546                           | 5, 8           |
| Noll v. United States, 83 F. Supp. 887                                 | 5              |
| Parsell v. United States, 218 F. 2d 232                                | 5              |
| People v. Bernard, 21 Cal. App. 56, 130 P. 1063                        | 17             |
| People v. Cohen, 113 Cal. App. 260, 298 P. 114                         | 17, 19         |
| People v. Lucas, 67 Cal. App. 452, 227 P. 709                          | 17, 18         |
| Richardson v. Hatch, 134 F. Supp. 110                                  | 5, 7           |
| Taylor v. Steele, 191 F. 2d 852  | 5              |
| United States ex rel. Lawson v. Skeen, 145 F. Supp. 776                | 15             |
| Wall v. Hudspeth, 108 F. 2d 865  | 16             |
| Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652    | 15             |
| Williams v. McCulley, 131 F. Supp. 162                                 | 5              |
| Williams v. United States, 215 F. 2d 695                               | 15             |

### CODES

|                                   |            |
|-----------------------------------|------------|
| California Penal Code Section 470 | 16, 17, 19 |
| California Penal Code Section 476 | 17, 19     |
| Title 28, U. S. C. Section 1915   | 4, 5       |
| 2101(c)                           | 11         |
| 2254                              | 9, 10      |

### RULES

|                               |    |
|-------------------------------|----|
| Supreme Court Rules, Rule 38½ | 11 |
|-------------------------------|----|

No. 15965

# UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES BLAIR,

*Appellant,*

vs.

ROBERT A. HEINZE, Warden of the  
California State Prison at Folsom,

*Appellee.*

## APPELLEE'S BRIEF

Appeal From the United States District Court for the  
Northern District of California, Northern Division

## STATEMENT OF THE CASE

The appellant, Charles Blair, presented to the United States District Court for the Northern District of California, Northern Division, two petitions for writ of habeas corpus on or about the sixteenth day of July, 1957. (TR.\* 1-40, 41-62.) Leave was asked to file these petitions in forma pauperis. (TR. 5, 37, 41, 60.) On July 31, 1957, the Honorable Sherrill Halbert, Judge of the United States District Court, ordered that the petitioner's motion to file each and/or both

\* TR. refers to Clerk's Transcript of Record on Appeal.

of his proposed petitions for writ of habeas corpus in forma pauperis be denied (TR. 67). A motion for a certificate of probable cause presented to the District Court was denied on September 11, 1957 (TR. 80-81). Thereafter the appellant petitioned this court for an order granting a certificate of probable cause and such an order was issued by this court on February 21, 1958 (TR. 81-83).

The first petition filed by the appellant in the District Court alleged that he was confined by the state authorities contrary to the provisions of the United States Constitution and in violation of due process of law for the reason that he was not properly informed of the charge against him in that the information filed in the Superior Court of Los Angeles County was insufficient to charge the commission of a crime. He also contended that he was arrested and searched without reasonable or probable cause and that he was induced to plead guilty by his counsel who promised that he would thereby receive a lesser sentence.

The second petition (combining action) alleged that prison officials had destroyed certain of the petitioner's legal papers and had thus frustrated his efforts to petition the United States Supreme Court for certiorari.

These same points were raised in three applications for writs of habeas corpus presented to the Supreme Court of the State of California on December 31, 1956, March 8, 1957, and March 22, 1957. The first petition attacking the validity of his conviction was denied by

the State Supreme Court without opinion on January 30, 1957 (*In re Blair*, Calif. Sup. Ct. No. 6015).

Thereafter on March 8, 1957, the appellant filed the second petition for writ of habeas corpus in the Supreme Court of the State of California alleging that he had been denied due process of law and equal protection of the laws by the action of the prison officials in confiscating and refusing to return certain legal documents which were in his prison cell. This petition was denied by the State Supreme Court on April 10, 1957 (*In re Blair*, Calif. Sup. Ct. No. 6044).

In opposition to this petition the respondent lodged with the State Supreme Court affidavits of two prison officials showing that none of the petitioner's property (except a mirror) had been retained by the prison officials.

During the pendency of this latter petition in the State Supreme Court the appellant filed a third petition therein on March 22, 1957. This petition again raised the original points which were raised in the petition filed on December 31, 1957, and denied on January 30, 1957. The third petition was denied by the State Supreme Court on April 10, 1957 (*In re Blair*, Calif. Sup. Ct. No. 6052).

The appellant did not petition the United States Supreme Court for a writ of certiorari with respect to any of these three petitions for writ of habeas corpus which were filed in the State Supreme Court.

## ARGUMENT

### I. The District Court Properly Denied the Appellant's Application to File His Petitions for Writ of Habeas Corpus in Forma Pauperis

The record on appeal in this case shows that the appellant presented to the District Court two petitions for writ of habeas corpus (TR. 1-40 and 41-62). Each of these documents contains a request that the court grant petitioner leave to file in forma pauperis (TR. 5, lines 7-9, and TR. 41, lines 22-26) and an "affidavit of forma pauperis" (TR. 37-38, 59-60).

On July 31, 1957, the Honorable Sherrill Halbert, United States District Judge filed a memorandum and order denying the appellant's motions to file his proposed petitions for a writ of habeas corpus in forma pauperis (TR. 63-67). At the outset we are herein faced with the question whether the District Court properly exercised its discretion in denying to the appellant leave to file and prosecute his petitions in forma pauperis. Title 28, U. S. C. section 1915 provides:

"(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein without prepayment of fees and costs or security therefor, by a citizen who makes affidavit that he is unable to pay such costs or give such security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress."

This section provides that the court to which application is made “*may* authorize” the commencement of the action in forma pauperis. Thus it is clear from the wording of the section that the court to which application is made is vested with a discretion in determining whether the application for leave to proceed in forma pauperis should be granted. The decisions support the conclusion that the court has such discretion in granting or refusing the request for leave to file in forma pauperis.

*Noll v. United States*, 83 F. Supp. 887;  
*Williams v. McCulley*, 131 F. Supp. 162;  
*Meek v. City of Sacramento*, 132 F. Supp. 546;  
*Richardson v. Hatch*, 134 F. Supp. 110;  
*Taylor v. Steele*, 191 F. 2d 852;  
*Higgins v. Steele*, 195 F. 2d 366;  
*Parsell v. United States*, 218 F. 2d 232.

(a) THE DISTRICT COURT PROPERLY CONSIDERED THE MERITS  
OF THE PETITIONS IN EXERCISING ITS DISCRETION UNDER  
TITLE 28 U. S. C. § 1915

The appellant concedes that he “has no right to proceed in forma pauperis,” but, he contends the District Court had no authority to consider any matter except the indigency of the appellant in exercising the discretion vested in the court. The cases cited above hold that in considering the question of whether an applicant should be permitted to proceed in forma pauperis the court may base its decision on the merit or lack of merit in the proposed action. The indigency of the applicant is not the sole question to be considered. On the contrary, from a consideration of the

opinions in the cited cases this element would appear to be of secondary importance.

In the case of *Higgins v. Steele*, 195 F. 2d 366, which has been cited above, the court stated as follows at page 368:

“While the District Court correctly dismissed this proceeding, we think it should not have granted Higgins leave to proceed in forma pauperis, should not have put the respondent to the trouble and expense of making a return, should not have allowed Higgins leave to appeal as a poor person, and should have certified that his appeal was not taken in good faith. This proceeding was obviously doomed to futility from its inception and could not lawfully have been entertained.

“Leave to proceed in forma pauperis under 28 U. S. C. A. § 1915 is a privilege, not a right. *Prince v. Klune*, 80 U. S. App. D. C. 31, 148 F. 2d 18; *Dorsey v. Gill*, 80 U. S. App. D. C. 9, 148 F. 2d 857, 877. An application for leave to proceed in forma pauperis is addressed to the sound discretion of the court, and an order denying such an application is not a final order from which an appeal will lie, *Crockett v. United States*, 9 Cir., 136 F. 2d 11; *Barkdoll v. United States*, 9 Cir., 147 F. 2d 617, 618-619, nor is the order reviewable by mandamus. *Fisher v. Cushman*, 9 Cir., 99 F. 2d 918. This Court has, however, entertained appeals from such orders, on the assumption that they were appealable, in at least two cases. *Gilmore v. United States*, 8 Cir., 131 F. 2d 873; and *Taylor v. Steele*, 8 Cir., 191 F. 2d 852.”



The case of *Richardson v. Hatch*, 134 F. Supp. 110 also considered this question at length and citing numerous cases on the point stated as follows at page 112:

“Under the above-quoted provisions of the statute, 28 U. S. C. A. § 1915, a district court, in the exercise of judicial discretion, may authorize or refuse to authorize the commencement and prosecution of any action without prepayment of fees and costs or the giving of security therefor. The law is well established that a Federal court should not grant a plaintiff leave to file a complaint and proceed in forma pauperis where it is clear that his proposed action is wholly without merit and will be futile, or is frivolous or malicious. In *Gilmore v. United States*, 8 Cir., 131 F. 2d 873, 874, the court said:

‘A federal court will not grant leave to a poor person to proceed in forma pauperis, under § 832 [now § 915], Title 28, U. S. C. A., if it is clear that the proceeding which he proposes to conduct is without merit and will be futile. . . . [Citing cases].’

“In the case of *Prince v. Klune*, 80 U. S. App. D. C. 31, 148 F. 2d 18, in considering an application for leave to proceed in forma pauperis the court said:

‘This statutory privilege of filing a suit without prepaying costs is conferred only upon a citizen who is “entitled to commence” a suit. In a sense it may be said that one is always entitled to commence any suit, even a suit which asserts no claim upon which relief can be granted.

But the quoted phrase in its context cannot reasonably be interpreted so broadly. The statute is not intended to confer the privilege of commencing, without prepaying costs, a suit which is plainly without merit.'

"In *Johnson v. Hunter*, 10 Cir., 144 F. 2d 565, 566, in denying a petition for leave to proceed without payment of costs, the court said:

'Attached to the Petition for Leave to Appeal filed herein is a copy of the original Petition for Writ of Habeas Corpus and copies of the orders entered by the District Court. Both orders were based by the District Court solely upon the proposition that the Petition for Writ of Habeas Corpus fails to disclose that petitioner has a meritorious cause and that it presented no issue of fact upon which the petitioner is entitled to a hearing under the rule announced in *Waley v. Johnston*, 316 U. S. 101, 62 S. Ct. 964, 86 L. Ed. 1302.

'A District Court is not required to permit a poor person to file a petition without payment of costs unless there is a showing of merit. *Whittle v. St. Louis & San Francisco R. Co., C. C.*, 104 F. 286; *Kinney v. Plymouth Rock Squab Co.*, 236 U. S. 43, 35 S. Ct. 236, 59 L. Ed. 457.' "

In the case of *Meek v. City of Sacramento*, 132 F. Supp. 546 the District Court for the Northern District of California, Northern Division, the same court from which this appeal is taken, held that the court was obligated to consider the merits of a petition for writ of habeas corpus prior to granting leave to file the

same in forma pauperis. The court discussed this point in its opinion at page 546:

“Preliminarily it should be noted that leave to proceed in forma pauperis is a privilege and not a right, *Clough v. Hunter*, 10 Cir., 191 F. 2d 516; *Willis v. Utecht*, 8 Cir., 185 F. 2d 210; *Johnson v. Hunter*, 10 Cir., 144 F. 2d 565; *Prince v. Klune*, 80 U. S. App. D. C. 31, 148 F. 2d 18; and *Dorsey v. Gill*, 80 U. S. App. D. C. 9, 148 F. 2d 857. A duty is imposed upon this Court to examine any application for leave to proceed in forma pauperis to determine whether the proposed proceeding has merit, and if it appears that the proceeding is without merit, this Court is bound to deny a motion seeking leave to proceed in forma pauperis, *Higgins v. Steele*, 8 Cir., 195 F. 2d 366; *Huffman v. Smith*, 9 Cir., 172 F. 2d 129; *Tate v. California*, 9 Cir., 187 F. 2d 98; *Gilmore v. United States*, 8 Cir., 131 F. 2d 873; and *Fisher v. Cushman*, 9 Cir., 99 F. 2d 918.”

## **II. The Petitioner Has Failed to Exhaust His State Remedies and Has Not Shown Exceptional Circumstances Which Will Excuse Such Failure**

The record in this matter shows that the appellant did not exhaust his State remedies and therefore the District Court's denial of his petitions or the right to file them in forma pauperis was required by the provisions of Title 28 U. S. C. § 2254. It is now well settled that exhaustion of State remedies requires that a prisoner in custody pursuant to a judgment of a State court must petition the United States Supreme

Court for a review by certiorari of the State court's decision. (*Ex parte Hawk*, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572; *Darr v. Burford*, 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761.) This requirement must be met "except when there is an absence of an available state corrective process, or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner" (*Darr v. Burford*, 339 U. S. at page 218; Title 28 U. S. C. § 2254). The Supreme Court further stated in *Darr v. Burford*, 339 U. S. 200 at page 218:

"Flexibility is left to take care of the extraordinary situations that demand prompt action."

But, except for those exceptional cases in which the absolute necessity for prompt action requires that the ordinary procedure be bypassed or such process is shown to be wholly ineffectual the Supreme Court has said that the filing of a petition for writ of certiorari in the United States Supreme Court is an indispensable requirement in the exhaustion of state remedies. The reasoning of the Supreme Court is clearly reflected in the following quotation from its decision in *Darr v. Burford*, 339 U. S. at page 217, 70 S. Ct. at page 597, 94 L. Ed. at page 774:

"It is this Court's conviction that orderly federal procedure under our dual system of government demands that the state's highest courts should ordinarily be subject to reversal only by this Court and that a state's system for the administration of justice should be condemned as constitutionally inadequate only by this Court. From this conviction

springs the requirement of prior application to this Court to avoid unseemly interference by federal district courts with state criminal administration.”

Turning to the facts in the present case the record shows that three separate petitions for writ of habeas corpus were filed in the Supreme Court of the State of California; that collectively these petitions raised all of the grounds urged in the petitions presented to the United States District Court including the matter of destruction of the petitioner’s legal documents by prison officials; and, that in none of these three cases did the appellant petition the United States Supreme Court for a writ of certiorari.

The first of these petitions was filed in the State Supreme Court on December 31, 1956 (*In re Blair*, California Supreme Court No. 6015). The petition alleged that the information upon which appellant was convicted was defectively drawn and did not adequately inform him of the charge against him; and, secondly, that his plea of guilty was the result of improper advice by his counsel. This petition was denied by the State Supreme Court on January 30, 1957. The appellant has made no showing that he prepared or attempted to file a petition for writ of certiorari within the 90 days allowed by law (Title 28 U. S. C. § 2101(c), Supreme Court Rules, Rule 38½), nor did the appellant request any extension of time for the purpose of filing such a petition.

The second petition in the State Supreme Court was filed on March 8, 1957 (*In re Blair*, California

Supreme Court No. 6044). In this petition the appellant alleged that prison officials had taken some of his legal papers and had refused to return them to him. It should be specially noted at this point that this is the principal ground upon which the appellant now argues that the District Court should have entertained the appellant's petitions and issued an order to show cause. It is the basis of the appellant's argument in this appeal that the judgment of the District Court should be reversed with directions to that court to "entertain appellant's petition and grant a hearing on the allegations with respect to the suppression of his legal documents" (Appellant's Brief, page 20).

The respondent in opposition to this petition (in the State Supreme Court) lodged with that court affidavits of two prison officials showing that all articles (except a mirror) which had been taken from the petitioner's cell had been returned to him.

Although the appellant contends that the alleged suppression of his legal documents by prison officials presents a justiciable question relating to the denial of the appellant's right to equal protection of the laws under the Fourteenth Amendment, there is no showing that the appellant sought certiorari in the United States Supreme Court after a denial of his petition in the State Supreme Court. The appellee respectfully submits that as to this particular question the appellant was required to exhaust his state remedies, including the filing of a petition for writ of certiorari. In the absence of such a showing or any indication of

exceptional circumstances as to this point the District Court had no jurisdiction to entertain the petition on this ground. (*Darr v. Burford*, 339 U. S. 200, 70 S. Ct. 589, 94 L. Ed. 761.)

With respect to the appellant's petition for writ of habeas corpus relating to the invalidity of his conviction there is nothing to support his contention that he was prevented from petitioning for writ of certiorari by the actions of prison officials. The papers which the appellant states were destroyed by the prison officials were not a part of the record in the case and were not essential to the preparation or filing of such a petition. (Supreme Court Rules, Rule 38, paragraph 2.) The lack of any real need for these particular papers is established by the fact that the appellant filed a third petition for writ of habeas corpus in the State Supreme Court on March 22, 1957 (*In re Blair*, Calif. Supreme Court No. 6052), alleging the same grounds as contained in his petition filed on December 31, 1956.

This latter petition and the petition filed on March 8, 1957, were both denied by the State Supreme Court on April 10, 1957. The appellant does not allege that he was prevented in any way from petitioning for a writ of certiorari in the United States Supreme Court after denial of these last two petitions or that his lost papers which had disappeared prior to the filing of these petitions were needed as an essential part of such petition for writ of certiorari. The very fact that the appellant has been able to file petitions in both the state courts and the United States District

Court, setting forth copies of the information, judgment and commitment indicate conclusively that he is not handicapped or restricted in the preparation of his pleadings.

It is therefore respectfully submitted that the appellant has not exhausted his state remedies and has not shown circumstances bringing his case within any exception to the rule. His petitions were properly denied by the District Court for this reason. (*Ex parte Hawk*, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572; *Darr v. Burford*, 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761.)

### III. The Underlying Allegations of the Appellant's Petition on the Merits Do Not State a Justiciable Federal Question

The District Court denied the appellant leave to file his petitions in forma pauperis (TR. 67). In rendering its decision the court found that the petitions were without merit. It is respectfully submitted that the conclusion of the District Court is eminently correct and should be affirmed by this court. The appellant's contentions are three: (1) that his original arrest and the accompanying search were illegal; (2) that he was improperly induced to plead guilty at the suggestion of his counsel and upon the expectation that he would receive a lighter sentence than he did; and (3) that the information to which he pleaded guilty was insufficient to properly inform him of the crime charged against him. We shall consider these points in the order mentioned.



(a) THE LEGALITY OF APPELLANT'S ARREST

It is unnecessary to determine whether or not the appellant's arrest and search were legal or not. It is obvious that the validity of the arrest and search have no bearing on the question of the appellant's conviction on his plea of guilty. There was no introduction of evidence illegally obtained. The judgment under which the appellant is incarcerated rests upon the proceedings in the Superior Court not upon facts surrounding his arrest. It is well settled that irregularities in the arrest of a defendant or other preliminary proceedings are waived by the failure of the defendant to object at the time and do not affect the validity of a subsequent judgment on the merits. (*In re Berry*, 43 Cal. 2d 838, 279 P. 2d 18; *In re Razutis*, 35 Cal. 2d 532, 219 P. 2d 15 (Cert. Den. 340 U. S. 842); *In re Tedford*, 31 Cal. 2d 693, 192 P. 2d 3 (Cert. Den. 335 U. S. 847); *In re Basham*, 24 Cal. App. 2d 285, 74 P. 2d 781.) Even if it be assumed that there was some irregularity in the matter of the appellant's arrest, such infirmities do not give rise to a constitutional question relating to the validity of appellant's conviction. (*Weeks v. United States*, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652; *Williams v. United States*, 215 F. 2d 695; *Breithaupt v. Abram*, 352 U. S. 432, 77 S. Ct. 408, 1 L. Ed. 2d 448; *United States ex rel Lawson v. Skeen*, 145 F. Supp. 776.)

(b) THE APPELLANT'S PLEA OF GUILTY

The appellant alleges in his petition that he was improperly induced to plead guilty. He expresses disappointment with the fact that his codefendants were given county jail sentences while he was sentenced to the state prison. The propriety or impropriety of a plea of guilty which has been entered upon advice of counsel does not present a constitutional question which is reviewable in a federal court on habeas corpus. This is settled beyond dispute. (See *Wall v. Hudspeth*, 108 F. 2d 865 and authorities therein cited.) The allegations of the appellant's petitions do not show the existence of such outrageous circumstances or the action of state officials as would warrant an exception to this general rule (*Darr v. Burford*, 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761; *Lyle v. Eidson*, 182 F. 2d 344 (Cert. Den. 340 U. S. 837)).

(c) THE SUFFICIENCY OF THE ALLEGATIONS  
OF THE INFORMATION

The appellant asserts that the information was defective in that the allegations thereof did not adequately inform him of the crime with which he was charged. A copy of the information is set forth in the petition presented to the District Court (TR. 13-14). The information charges the appellant with the crime of forgery of fictitious name in violation of Section 470 of the Penal Code of the State of California, in that on a certain date the appellant, with intent to

cheat and defraud certain named persons, did make, alter, pass, utter and publish a certain fictitious check.

The alleged insufficiency of the information is said to consist in the fact that the fictitious name is not set forth in the information and that the facts charge a violation of Penal Code Section 476 rather than Section 470. Section 470 of the California Penal Code provides that:

“Every person who, with intent to defraud, signs the name of another person, *or of a fictitious person*, knowing that he has no authority so to do, to, or falsely makes, alters, forges, or counterfeits, any \* \* \* check, draft, bill of exchange, \* \* \* for the payment of money or property, \* \* \* is guilty of forgery.” (emphasis added)

Section 476 of the Penal Code defines the offense of making or passing a fictitious check, bill, or note for the payment of money of some bank, corporation or individual when in fact no such bank, corporation or individual exists. In the present case the appellant was charged with a violation of Section 470, forgery of a fictitious name. The check in question was therefore a fictitious one. The information clearly charged a violation of Section 470 and it was sufficient to inform the appellant of the charges against him.

The authorities in this State clearly hold that the forgery of a fictitious name may be prosecuted either under Section 470 or 476 of the Penal Code. (See *People v. Bernard*, 21 Cal. App. 56, 130 P. 1063; *People v. Lucas*, 67 Cal. App. 452, 227 P. 709; *People*

v. *Cohen*, 113 Cal. App. 260, 298 P. 114.) In *People v. Lucas*, above cited, the court discussed this point as follows on page 454:

“Section 470 of the Penal Code was amended in 1905, and apparently for the purpose of making it sufficiently broad to cover the making of a fictitious check, as well as forged checks.

“In *People v. Bernard*, 21 Cal. App. 56 [130 Pac. 1063], the defendant was prosecuted for the identical offense as here charged, and the proof was substantially as here produced, and upon appeal a like objection was made. That case is authority for the right to prosecute under either section 470 or 476 of the Penal Code. A portion of that decision is as follows: ‘Appellant claims that the court erred, for the reason, as he claims, that a prosecution for making a fictitious check should be under section 476 of the Penal Code, and not under section 470, under which this case was prosecuted, citing in support thereof *People v. Elliott*, 90 Cal. 486 [27 Pac. 433], and *People v. Eppinger*, 105 Cal. 36 [38 Pac. 538]. Since those cases were decided, however, section 470 has been amended to avoid the rule laid down in those cases and so as to cover the case made by the proof in this action, and covered by the instruction given by the court and now challenged by appellant. (Stats. 1905, p. 673.)’

“Prosecutions were being had before the 1905 amendment, and many cases failed solely because upon an information charging forgery a defendant would cause it to appear that the check was a fictitious check, and thus thwart the prosecution. In 12 Cal. Jur., section 7, it is laid down that a

prosecution for forgery, where it is accomplished by passing a fictitious check, may be had under either sections 470 or 476 of the Penal Code, since said amendment of 1905.”

Similarly, in the case of *People v. Cohen*, 113 Cal. App. 260, 298 P. 114, the court stated as follows on page 262:

“His first contention is that an information based upon section 470 of the Penal Code is insufficient to support a conviction where it appears that the drawer of the forged instrument is a fictitious character. Since the amendment of 1905 to section 470, this contention is no longer tenable. (*People v. Gayle*, (1927) 202 Cal. 159 [259 Pac. 750], citing *People v. Whitaker*, (1924) 68 Cal. App. 7 [228 Pac. 376], *People v. Lucas*, (1924) 67 Cal. App. 452 [227 Pac. 709], and *People v. Jones*, (1909) 12 Cal. App. 129 [106 Pac. 724].) The information in *People v. Lucas* was in substance that found in each of the four counts in the instant case. (See, also, *People v. Winthrop*, (1928) 88 Cal. App. 591 [264 Pac. 263], *People v. Carmona*, (1926) 80 Cal. App. 159 [251 Pac. 315], and *People v. Bernard*, (1913) 21 Cal. App. 56 [130 Pac. 1063].)”

It therefore appears that there is no merit in the appellant's contention that the facts alleged in the information charged a violation of Section 476 and not a violation of Section 470.

The facts in this case are not analogous to those in the case relied upon by the appellant, namely *Cole v. Arkansas*, 333 U. S. 196, 68 S. Ct. 514, 92 L. Ed. 644.

In the *Cole* case the petitioners were tried and convicted of a violation of Section 2 of a particular state statute. Their conviction was affirmed by the State Supreme Court on the specific ground that they had violated Section 1 of the act which described an entirely different offense. The United States Supreme Court granted certiorari and reversed. In setting forth the facts the United States Supreme Court stated as follows:

“We therefore have this situation. The petitioners read the information as charging them with an offense under section 2 of the act, the language of which the information had used. The trial judge construed the information as charging an offense under section 2. He instructed the jury to that effect. He charged the jury that petitioners were on trial for the offense of promoting an unlawful assemblage, not for the offense ‘of using force and violence.’ Without completely ignoring the judge’s charge, the jury could not have convicted petitioners for having committed the separate, distinct, and substantially different offense defined in section 1. Yet the State Supreme Court refused to consider the validity of the convictions under section 2, for violation of which petitioners were tried and convicted. It affirmed their convictions as though they had been tried for violating section 1, an offense for which they were neither tried nor convicted.”

In holding that the petitioners had been denied due process of law the Supreme Court held that:

“To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.”

Although the information in the present case could have been more explicit in setting forth the facts it was, nevertheless, sufficient to inform the defendant of the charge against him and he was not, as in the *Cole* case, convicted on a separate and distinct offense from that charged in the information. Any slight imperfection in the drafting of the information did not deprive the appellant of his constitutional rights, especially where he was represented by counsel and he has not shown that he was deprived of any defense by reason of any imperfection in the information (*Ex parte Hull*, 312 U. S. 546, 61 S. Ct. 640, 85 L. Ed. 1034).

## CONCLUSION

It is respectfully submitted that the petitions presented to the District Court in this matter do not raise any constitutional question which the District Court was required to pass upon. The appellant having failed to exhaust his state remedies and his underlying petitions being obviously without merit the District Court properly denied his application to file his

petitions in forma pauperis. It therefore appears that the present appeal is without merit and should be dismissed.

Respectfully submitted,

EDMUND G. BROWN

Attorney General of the State  
of California

DORIS H. MAIER

Deputy Attorney General of  
the State of California

GAIL A. STRADER

Deputy Attorney General of  
the State of California

*Attorneys for Appellee*



No. 15,969

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

RANDOLPH DALE PEARCE,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

**BRIEF FOR APPELLEE.**

ROBERT H. SCHNACKE,

United States Attorney,

RICHARD H. FOSTER,

Assistant United States Attorney,

DONALD B. CONSTINE,

Assistant United States Attorney,

422 Post Office Building,

7th and Mission Streets,

San Francisco 1, California,

*Attorneys for the United States.*

FILED

OCT 17 1958

PAUL P. O'BRIEN, CLERK



## Subject Index

---

|  | Page |
|--|------|
| Jurisdiction .....   | 1    |
| Statement of the case .....  | 1    |
| Questions presented .....  | 3    |
| Argument .....   | 3    |
| I. Denial of a motion to inspect a presentence investigative report is non-appealable .....  | 3    |
| II. Disclosure of presentence reports is neither desirable nor required by Rule 32 (c) ..... | 6    |
| III. There is no "case or controversy" here .....  | 9    |
| Conclusion .....   | 11   |

---

## Table of Authorities Cited

---

| Cases   | Pages |
|---|-------|
| Benson v. United States, (9th Cir.), 93 F.2d 749 .....        | 3, 9  |
| Brown v. United States, (9th Cir.), 222 F.2d 293 .....        | 4     |
| Bryson v. United States, No. 15,881, C.A. 9th Cir. ....       | 8, 9  |
| Burns v. United States, 287 US 216 .....                      | 4     |
| Elder v. United States, (9th Cir.), 142 F.2d 199 .....        | 4     |
| Flores v. United States, (9th Cir.), 238 F.2d 758 (1956) ...  | 4     |
| Freedman v. United States, (1st Cir.), 200 F.2d 686 (1952)    | 7     |
| Guerrera v. United States, (8th Cir.), 40 F.2d 338, 340 ..... | 4     |
| Powell v. Alabama, 287 US 45 .....                            | 5     |

|   | Pages |
|---|-------|
| United States v. Rio Grande Dam and Irrigation Company,<br>184 US 416 ..... | 4     |
| Williams v. New York, 337 US 241 .....                                      | 5, 6  |

### Constitutions

|  |   |
|--|---|
| United States Constitution, 6th Amendment .....  | 5 |
| United States Constitution, 14th Amendment ..... | 5 |

### Statutes

|                                  |       |
|----------------------------------|-------|
| 54 Stat. 688 .....               | 6     |
| 18 U.S.C. Section 2314 .....     | 1, 3  |
| 18 U.S.C. Section 5010 (b) ..... | 2, 10 |
| 28 U.S.C. 1291 .....             | 1, 3  |

### Rules

|   |          |
|---|----------|
| Federal Rules of Criminal Procedure Rule 20 .....     | 2, 10    |
| Federal Rules of Criminal Procedure Rule 32 (c) ..... | 3, 6, 11 |
| Federal Rules of Criminal Procedure Rule 57 .....     | 6        |

No. 15,969

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

RANDOLPH DALE PEARCE,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

---

**BRIEF FOR APPELLEE.**

---

**JURISDICTION.**

Jurisdiction is invoked under Section 1291 Title 28 United States Code. As hereafter will appear, it is the belief of the appellee that there is no jurisdiction to consider this appeal.

---

**STATEMENT OF THE CASE.**

Appellant was indicted in the District of Oregon for violation of the Dyer Act, 18 U.S.C. Section 2314, on February 12, 1958. (TR 13-14). On February 19, 1958, the appellant, after having been arrested in the Northern District of California, consented to have the charges against him in the District of Oregon dis-

posed of in the Northern District of California pursuant to the provisions of Rule 20 of the Federal Rules of Criminal Procedure. (TR 4, TR 10.) On March 5, 1958 appellant pleaded guilty to the charges against him in the District of Oregon. (TR 15.) Appellant was then sentenced as a youthful offender under the provisions of the Federal Youth Corrections Act, 18 U.S.C. 5010 (b). On February 25, 1958 appellant noticed a motion for an order directing the Probation Service to allow appellant's counsel to inspect the presentence investigative report. (TR 1.)

Argument on this motion was had on March 5, 1958 (TR 20 through 23). In the course of this argument appellant's counsel indicated that he had discussed orally with the Probation Officer, "at length," the details of the probation report. (TR 20.) The motion to inspect the probation report was denied (TR 17, TR 22). At the time of sentence appellant's counsel requested that the appellant be sentenced as a youthful offender under the provisions of Section 5010 (b) of Title 18 United States Code pursuant to the Federal Youth Corrections Act. Following the Court's sentence, in accordance with appellant's request, under the provisions of the Federal Youth Corrections Act, appellant appealed to this Court from the order denying the motion to inspect the presentence report. (TR 38.)

Appellant specifies alone, as error, the denial of motion to inspect the Probation Service's presentence investigative report (Appellant's Brief pages 3-4). The United States moved to dismiss on the grounds

that appeal was made from a non-appealable order. This motion was denied by the Court of Appeals without prejudice to the United States arguing the question of the order's appealability at the time of the appeal in chief.

---

### **QUESTIONS PRESENTED.**

1. Is the denial of a motion to inspect a presentence report appealable?
  2. Is there a "case or controversy" here presented?
  3. Does Rule 32(c) of the Federal Rules of Criminal Procedure provide for inspection of presentence reports?
- 

### **ARGUMENT.**

#### **I. DENIAL OF A MOTION TO INSPECT A PRESENTENCE INVESTIGATIVE REPORT IS NON-APPEALABLE.**

This case involves an appeal from an order of the District Court for the Northern District of California denying appellant's motion to inspect the presentence investigation report in connection with appellant's plea of guilty to a violation of Section 2314 of Title 18 United States Code. In a criminal case appeal lies only from the judgment of conviction. *Benson v. United States*, (9th Cir.), 93 F.2d 749. The order of the District Court in denying appellant's motion for inspection of the probation report is not a final order under Section 1291 Title 28 United States Code. In the instant case no question is raised concerning the

validity of the judgment of conviction or the sentence imposed. The only question which is raised concerns the denial of a motion by the Court to allow counsel for appellant to examine the probation report. The order of the Court was not a "final order" and hence is not appealable.

Sentence is within the discretion of the District Court. In *Flores v. United States*, (9th Cir.), 238 F.2d 758 (1956) this Court stated "This Court has no control over a sentence which is within the limits allowed by statute." See also *Brown v. United States*, (9th Cir.), 222 F.2d 293; *Guerrera v. United States*, (8th Cir.), 40 F.2d 338, 340. In the instant case Rule 32 (c) leaves the question of whether or not probation reports should be supplied to defendants to the discretion of the District Court. Matters entirely within the discretion of a trial court can not be made the basis of an appeal. *United States v. Rio Grande Dam and Irrigation Company*, 184 U.S. 416. Unless the due process clause of the Federal Constitution is involved, Appellate Courts have no authority to review the practice of District Courts concerning the confidential nature of probation reports. The granting of probation is a matter entirely within the province of the District Court and the exercise of this power can not be questioned on appeal. *Elder v. United States*, (9th Cir.), 142 F.2d 199. See also *Burns v. United States*, 287 U.S. 216.

Appellant has pointed to no statute or rule of Court which requires that probation reports be supplied to defense counsel. He expressly repudiates any con-



tion that "due process" is an issue in the appeal. (Page 5 appellant's brief.) His claim that disclosure of the report is a matter of right seems in essence to be based on an assertion that disclosure is "better procedure." (Appellant's Brief page 6.) In brief, his claim is based on the desirability of disclosure rather than the illegality of non-disclosure.

His only constitutional attack is based upon the effective assistance of counsel requirements of the Sixth Amendment. If, however, *Williams v. New York*, 337 U.S. 241 has disposed of the question of constitutionality with respect to state non-disclosure, it would seem to be equally dispositive of any constitutional objections which might be urged in Federal Court. The "due process" required under the Fourteenth Amendment includes the assistance of counsel required of the Federal Government by the Sixth Amendment. *Powell v. Alabama*, 287 U.S. 45. *Williams v. New York*, supra, by deciding that due process under the Fourteenth Amendment does not require the production of probation reports equally decides, for the purposes of the Sixth Amendment, that no constitutional infirmity exists. We see no constitutional difference in the requirement of counsel in state courts from that required in Federal Court.

In the absence of constitutional or statutory requirements that probation reports be disclosed, appellant's contention is a request for this Court to assume the rule-making power in Federal Criminal Procedure, which is limited by the Constitution and the statute to the Supreme Court and to the Congress. The rule-

making authority of a Court of Appeals does not extend to enacting rules for the District Court. Rule 57 of the Federal Rules of Criminal Procedure provides that District Court rules shall be promulgated by District Courts. The Supreme Court was given the power by Congress on June 29, 1940 to regulate Federal Criminal Procedure. 54 Stat. 688. This power was not entrusted to the Court of Appeals, and in the absence of any requirement in Rule 32 (c) of the Federal Rules of Criminal Procedure, this Court may not hold that probation reports must be public records. An appeal from a denial of a motion for inspection is, therefore, not reviewable by this Court.

---

## II. DISCLOSURE OF PRESENTENCE REPORTS IS NEITHER DESIRABLE NOR REQUIRED BY RULE 32 (c).

This Court may take judicial notice that probation reports in the Northern District of California, except where contrary provision is expressly made by the Court, are confidential. The Supreme Court in *Williams v. New York*, supra, has had occasion to consider the reason for treating probation reports differently than preconviction evidence. The Court stated: "We must recognize that most of the information now relied upon by Judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to open examination." The Court, in the *Williams* case, held that the Constitution did not require that counsel be allowed an

opportunity to examine the report of the Probation Officer. In *Freedman v. U.S.*, (1st Cir.), 200 F.2d 686 (1952) at 697 the Court held that the report of the Probation Officer was properly no part of the record in the case.

Probation officers who have considered the problem point to the fact that a disclosure of sources of the information contained in a presentence report would result in "drying up" important sources of information. See "The Confidential Nature of Presentence Reports, Catholic University of America Law Review, May 1955 by Lewis J. Sharp, Chief, Division of Probation Administrative Office of the United States Courts." Mr. Sharp says that, page 138, "It is not necessary here to spell out the obvious handicaps probation would encounter in dealing with the medical profession (particularly psychiatrists), government agencies (such as the military services, Veterans Administration), social agencies, families, employers, and neighbors if, under a system of disclosure, these sources were told that any information they would give would be disclosed to the defendant and that the chances were good they would become involved in time-consuming and unpleasant controversies in open court. The rules of many such agencies state that the information in their files is confidential and is to be divulged only to official persons and agencies and then only under rigid requirements covering use of the information. Even individuals without limitation on disclosure would prefer not to give information under any arrangement for unlimited disclosure.

“The Probation Officer would thus be reduced to including in the report only the most elementary factual information from public records and statements about the defendant which either were inconsequential or were in the defendant’s favor. The result would be a weak, ineffective report with little or none of the more meaningful data on attitudes, feelings, and personal standards and relationships so essential to adequate presentence investigation reports and probation supervision.”

Making probation reports public operates to dry up sources of information; information which is of aid in the delicate job of sentencing. This information is not always, and as a matter of fact is not in a majority of instances, unfavorable to the defendant. A criminal charge necessarily commands the intense scrutiny of the public. Anyone connected with the defendant, particularly in a highly publicized case, can not avoid a little of the odium which surrounds the defendant himself. People who write letters in connection with the Probation Officer’s investigation do so under the supposition that their names will not be exposed to the glare of publicity. It is simply not realistic to assume that people will write letters and give relevant information in favor of a defendant who has been charged with a reprehensible offense if they know that by so doing they run the chance of having the spotlight turned on them.

We believe that the Court’s attention should be called to the case of *Bryson v. United States*, No. 15,881, in the Court of Appeals for the Ninth Circuit.

In this case a motion was made by the defense to make the probation reports there involved part of the record on appeal. This motion was ultimately denied by the Court, even though the issue in the *Bryson* case was whether or not a sentence should have been modified by the trial Court. Implicit in the *Bryson* decision is a holding that probation reports are properly confidential.

---

### III. THERE IS NO "CASE OR CONTROVERSY" HERE.

Appellant is not appealing here from the judgment of conviction. His notice of appeal is ambiguous in this respect, since it refers to the order of denial of the presentence investigative report and goes on to say "from the judgment of the above-entitled court entered therein." In our reading of this statement by appellant it appears that the "judgment entered therein" refers back to the word "order" which appears in the same sentence. As has been previously stated such an appeal would not be from a "final order" of the District Court, since the "final order" of the District Court is the judgment of conviction. *Benson v. United States*, supra. Appellant's grounds for appeal are made abundantly clear, however, in his specification of error which reads as follows: "The Court below erred in denying defendant's motion to inspect the Probation Service's presentence investigative report made to the Court pursuant to Criminal Rule 32 (c)." Appellant in brief is not complaining about the judgment of conviction. Indeed he could not so complain, since under the provisions of Rule

20 only a plea of guilty could have been accepted in any event. He is not complaining concerning the sentence which he has received, since the sentence imposed was precisely the sentence which appellant's counsel requested at the time. At page 31 of the Transcript appellant's counsel made a plea to the Court that appellant be sentenced under the provisions of Section 5010 (b) of Title 18 United States Code, which is the Federal Youth Corrections Act. This disposition of the case was in fact ordered by the trial judge; so appellant has received exactly what he asked for.

What appellant is actually requesting from this Court is an advisory opinion as to whether or not probation reports should be supplied defense counsel in future cases. He can not contend that the lack of such a report injured him, since he received exactly what he desired.

Furthermore, in the instant case appellant's counsel actually had been informed of the details of the pre-sentence investigation. At page 20 of the transcript counsel indicated to the Court that he was orally informed of the details of the report by the Probation Officer at length. (TR 20.) There would appear to be no requirement in reason, expediency or law that a report, if it is required to be supplied at all, must be supplied in written rather than oral form. The Court at the time asked counsel the following question: "As a matter of practice you desire to establish for the information of counsel in making a presentation to the Court on judgment?" Counsel answered: "That's right." (TR 21.)

Appellant in this case is requesting this Court to make a rule rather than requesting this Court to reverse a conviction. The sentence he received was, from his standpoint, the most desirable possible. His conviction was on his, unquestioned here, plea of guilty. Appellant desires no reversal on the part of this Court; nor does he even request a resentencing by this Court, if such a thing is possible. He simply desires this Court to amend Rule 32 (c) of the Rules of Criminal Procedure so as to provide for the inspection of presentence reports. This, we submit, is not a matter with which the Court of Appeals can concern itself constitutionally. The desirability of such a rule is not a question on which the Court of Appeals can pass.

---

### CONCLUSION.

The judgment of the District Court should be affirmed or the appeal should be dismissed.

Dated, San Francisco, California,  
October 13, 1958.

ROBERT H. SCHNACKE,  
United States Attorney,

RICHARD H. FOSTER,  
Assistant United States Attorney,

DONALD B. CONSTINE,  
Assistant United States Attorney,

*Attorneys for the United  
States.*





No. 15,970

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

SALLY CHRISTY,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

On Appeal from the District Court of the United States for the  
District of Alaska, Fourth Judicial Division.

**BRIEF FOR APPELLEE.**

GEORGE M. YEAGER,

United States Attorney,

GEO. ALLEN McGRATH,

Assistant United States Attorney,

Fairbanks, Alaska.

*Attorneys for Appellee.*

FILE

AUG 19 1958

PAUL P. O'BRIEN, CL



## Subject Index

---

|  | Page |
|--|------|
| Jurisdiction .....   | 1    |
| Counterstatement of the case .....   | 1    |
| Questions presented .....  | 3    |
| Argument .....   | 4    |
| I. The testimony of accomplice Robinson was sufficiently corroborated to support the jury's verdict of guilty ...  | 4    |
| II. The court did not err in its instructions on accomplices or in giving an additional instruction after the jury reported they were deadlocked .....   | 6    |
| III. The trial court properly admitted Government's Exhibit "A" consisting of a judgment of prior conviction of an attempt to commit the crime of unnatural carnal copulation and an amended judgment reducing the punishment for the conviction ..... | 9    |
| Conclusion .....   | 11   |
| Appendix   |      |

## Table of Authorities Cited

---

| Cases  | Pages |
|--|-------|
| Adamson v. People State of Calif., 67 S.Ct. 1672, 332 U. S. 46, 91 LEd 1903, reh. den. 68 S.Ct. 27, 332 U. S. 784, 92 LEd 367 .....                                  | 10    |
| Bohol v. U. S., 227 F.2d 330 .....   | 10    |
| Brock v. State, 91 Ga. App. 141, 85 S.E. 2d 177 .....  | 7     |
| Bryson v. U. S., 238 F.2d 657, reh. den. 233 F.2d 837, cert. den. 78 S. Ct. 20, 355 U. S. 817, 2 LEd 2d 34, reh. den. 78 S.C. 138, 355 U. S. 879, 2 LEd 2d 110 ..... | 8     |
| Commonwealth v. Mills, 350 Pa. 478, 39 A. 2d 572 .....   | 10    |

|   | Pages |
|---|-------|
| Herzog v. U. S., 226 F.2d 561, opinion adhered to 235 F.2d 664, cert. den. 77 S.Ct. 54, 352 U. S. 844, 1 LEd 2d 59 .. | 8     |
| Hutson v. U. S., 238 F.2d 167 .....   | 8     |
| Johnson v. U. S., 195 F.2d 673 .....  | 7     |
| Meeks v. U. S., 163 F.2d 598 .....  | 10    |
| Nichols v. Commonwealth, 283 S. W. 2d 184 .....   | 10    |
| People v. Becker, 215 N. Y. 126, 109 N.E. 127 .....   | 5     |
| People v. Coffey, 161 Cal. 433, 119 P. 901 .....  | 6     |
| People v. Featherstone, 67 Cal. App. 2d 793, 155 P. 2d 685  | 6     |
| People v. Goldstein, 146 Cal. App. 2d 268, 303 P.2d 892 ...   | 7, 8  |
| People v. Hill, 77 Cal. App. 2d 287, 175 P.2d 45 .....  | 7     |
| People v. Morris, 110 CA 2d 469, 243 P. 2d 66 .....   | 6     |
| People v. Taylor, 30 Cal. App. 239, 232 P. 998 .....  | 5     |
| Pitts v. U. S., 237 F.2d 217 .....  | 8     |
| Stanley v. U. S., 245 F.2d 427, mot.den., 249 F.2d 64 .....   | 6     |
| State v. Brazell, 126 Ore. 579, 269 P. 884 .....  | 6     |
| State v. Holloway, 355 Mo. 217, 195 S. W. 2d 662 .....  | 10    |
| State v. Kent, 4 N.D. 577, 62 N. W. 631 .....   | 5     |
| Sukle v. People, 107 Col. 269, 111 P. 2d 233 .....  | 10    |
| White v. Commonwealth, 312 Ky. 543, 228 S. W. 2d 426 ....   | 10    |

### Statutes

|   |                |
|---|----------------|
| Act of June 6, 1900, c. 786, Section 4, 31 Stat. 322, as amended, 48 U.S.C. 101 ..... | 1              |
| Act of June 25, 1948, c. 646, 62 Stat. 929, as amended, 28 U.S.C. 1291 .....          | 1              |
| Alaska Compiled Laws Annotated, 1949, 58-4-61 ...                                     | 10, Appendix i |
| Alaska Compiled Laws Annotated, 1949, 65-9-10 .....                                   | Appendix i     |
| Alaska Compiled Laws Annotated, 1949, 66-13-59 ...                                    | 5, Appendix i  |
| Alaska Compiled Laws Annotated, 1949, 66-13-62 ...                                    | 7, Appendix i  |
| Alaska Compiled Laws Annotated, 1949, 66-13-63 ...                                    | 7, Appendix ii |

No. 15,970

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

SALLY CHRISTY,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

**On Appeal from the District Court of the United States for the  
District of Alaska, Fourth Judicial Division.**

**BRIEF FOR APPELLEE.**

---

**JURISDICTION.**

The jurisdiction of the District Court below was based upon the Act of June 6, 1900, c. 786, Section 4, 31 Stat. 322, as amended, 48 U.S.C. 101.

The jurisdiction of this Court of Appeals is invoked pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 929, as amended, 28 U.S.C. 1291.

---

**COUNTERSTATEMENT OF THE CASE.**

Appellant was seen at 2:00 A. M. on the night of April 2, 1957, in the rear seat of a taxi parked with

other cabs in front of the Silver Dollar Bar, Fairbanks, Alaska. Ralph V. Robinson and two fellow soldiers, Roger Akervik and George McCraw, left the Silver Dollar Bar about that time and approached the taxi in which appellant was seated. Witness Robinson testified as to what followed.

A. As we approached the same cab with the woman in it, the woman got out of the cab. I asked her where she was going, and she asked me how much money I had, and then I asked her what it would cost, and she said \$10, so I asked my two friends if they wanted to go, and both of them said no. So I only had five dollars, so I borrowed five from my buddy, Akervik, and we all got in the cab; Akervik, McCraw and the driver in the front seat, and myself and the girl in the back seat.

Q. And then what took place, if anything?

A. I gave the girl five dollars and we backed out, went down Cushman toward Three Mile Gate, and she told me to take down my pants, and I didn't think we had enough time from there to the Three Mile Gate to do the job. She took off her coat and her pants, and she wanted the other five dollars, and I didn't think we had enough time, so she asked the driver how long it would take us to get to the gate, and he said, "Five minutes or twenty minutes." So my pants had been down, and I gave her the other five dollars, and she said, "It ought to be worth it; that she was going down on it."

Q. And then what, if anything, happened?

A. She took my penis and put it in her mouth, . . . (TR 7-8.)

The evening's events were interrupted by Deputy Marshal Melville R. McRoberts and Special Agent Richard Hopkins of the Office of Special Investigations, United States Air Force, who pulled alongside and signaled the traveling taxi to stop. (TR 55). Appellant had been under the surveillance of these law enforcement agents as she waited in front of the Silver Dollar Bar. When the servicemen entered her taxi and it pulled away, McRoberts and Hopkins followed in a police car, observing the occupants of the taxi through its rear window. They followed for approximately three miles before stopping the taxi, and, after identifying himself, McRoberts asked Robinson to get out. (TR 34-39, 51-55.) The taxi drove on and Robinson was taken to the Federal Building in Fairbanks to make a statement. (TR 17.) Appellant was arrested the next day; was tried for unnatural carnal copulation; and convicted in the United States District Court, Fourth Judicial Division, District of Alaska.

---

### **QUESTIONS PRESENTED.**

Whether the testimony of accomplice Robinson was sufficiently corroborated to support the jury's verdict of guilty.

Whether the Court erred in its instructions on accomplices or in giving additional instruction to the jury after the jury reported they were deadlocked.

Whether the trial Court properly admitted government's Exhibit "A" consisting of a judgment of a

prior conviction of attempt to commit the crime of unnatural carnal copulation and an amended judgment reducing the punishment for the conviction.

---

## ARGUMENT.

### I.

**THE TESTIMONY OF ACCOMPLICE ROBINSON WAS SUFFICIENTLY CORROBORATED TO SUPPORT THE JURY'S VERDICT OF GUILTY.**

The story as told by Robinson was corroborated by the testimony of at least three other witnesses. George McCraw's account of first seeing appellant in a parked taxi and of Robinson's negotiations with her are the same as told by Robinson. (TR 28.) McCraw, as he rode in the front seat of the taxi, heard appellant tell Robinson to take his pants down. (TR 28.) McCraw related at the trial that after the police asked Robinson to leave the taxi:

. . . the lady said she was afraid he would talk, and the cab driver said he didn't think he would, so she asked us then did we have any money on us, so I told her no. Akervik said he had a little, so she asked him would he hide it and she asked us what our names were. (TR 29.)

Special Agent Hopkins and Deputy Marshal McRoberts both observed the three soldiers, Robinson, Akervik and McCraw, get into the taxi in which appellant was sitting. (TR 35, 49, 51, 52.) The police officers followed on the highway at a distance of about ten feet at one point. Their headlights were on high



enabling them to see the occupants through the rear window of the taxi. (TR 36, 38, 42, 53.) Appellant and Robinson were seen sitting close together as if they were making love in the rear seat. (TR 37.) Both McRoberts and Hopkins saw a hand go up behind the appellant's head and her head disappear in a downward direction. (TR 37, 55.) Hopkins testified appellant remained out of sight for three to five minutes and that she did not reappear until the police car in which he was riding pulled next to the taxi and a spotlight was directed into the back seat. (TR 37, 48.) McRoberts testified that Robinson's pants were completely unzipped when he stepped out of the taxi and stood on the highway. (TR 56.)

Under the laws of Alaska a conviction can be had upon the testimony of an accomplice only if the testimony be corroborated by such evidence as tends to connect the defendant with the commission of the crime. ACLA 1949, § 66-13-59. The reason for the rule is to safeguard defendant from a conviction based solely upon the evidence of accomplices. But this reason does not demand that the accomplice be corroborated in every part of his testimony or that this corroborating testimony be sufficient by itself to support a conviction. *People v. Becker*, 215 N.Y. 126, 109 N.E. 127; *State v. Kent*, 4 N.D. 577, 62 N.W. 631. In *People v. Taylor*, 30 Cal. App. 239, 232 P. 998, the Court stated that the test for corroboration is met even if it is evidence which is "slight and entitled, when standing alone, to but little consideration". Corroboration can be had from circumstantial

as well as direct evidence. Inferences from all the circumstances surrounding the criminal transaction are accepted as meeting the requirements for corroboration. *Stanley v. U. S.*, 245 F. 2d 427, mot.den., 249 F. 2d 64; *State v. Brazell*, 126 Ore. 579, 269 P. 884; *People v. Morris*, 110 C.A. 2d 469, 243 P. 2d 66.

---

## II.

**THE COURT DID NOT ERR IN ITS INSTRUCTIONS ON ACCOMPLICES OR IN GIVING AN ADDITIONAL INSTRUCTION AFTER THE JURY REPORTED THEY WERE DEADLOCKED.**

Appellant has complained on appeal that the Court erred in giving instruction No. 8 because that instruction did not inform the jury that Robinson was an accomplice as a matter of law. Questions of fact must be submitted to the jury for their determination. Where there is a dispute whether the witness did certain things which would make him an accomplice, a question of fact arises. *People v. Coffey*, 161 Cal. 433, 119 P. 901. Here the question as to whether witness Robinson participated in an act of unnatural carnal copulation with the appellant was disputed by appellant herself (TR 104-106), and was the very point in issue in the case. The Court properly instructed the jury, touching on the law concerning accomplices, and left the question whether or not prosecution witness Robinson was an accomplice for the jury to decide. *People v. Featherstone*, 67 Cal. App. 2d 793, 155 P. 2d 685. An instruction by the District Court that Robinson was an accomplice as a matter of law would

have been an expression by the Court as to what had been proved in the case, and consequently an usurpation of the jury's duty to weigh and decide the facts of the case. *ACLA* 1949, § 66-13-62, § 66-13-63; *Brock v. State*, 91 Ga. App. 141, 85 S.E. 2d 177.

As to the occupants in the taxi, the Court was not required to instruct the jury that they might have been accomplices. Akervik's action of declining to participate in a sexual act with appellant, and thereafter lending Robinson five dollars (\$5.00) to pay his fee to the appellant for the same act, (TR 7, 21, 28) is not sufficient involvement to make Akervik an accomplice. To establish the relationship of accomplice, two or more persons must unite in a common purpose to do an unlawful act. *Johnson v. U. S.*, 195 F. 2d 673. There must be a showing that not only did the alleged accomplice aid the principal but that at the same time he shared the criminal intent of him who actually committed the offense. *People v. Hill*, 77 Cal. App. 2d 287, 175 P. 2d 45.

However, even if Akervik were to be considered an accomplice, *People v. Goldstein*, 146 Cal. App. 2d 268, 303 P. 2d 892, as cited by appellant on pages 19 and 20 of her brief to support a contention of reversible error, is not in point. In the *Goldstein* case the Court of Appeals of California reversed the judgment of the lower Court for the Court's failure to give instructions on accomplices. In that case the Court of Appeals ruled that if the jury had found the third person in question to be an accomplice, there would not have been sufficient evidence to uphold the con-

viction. In the instant case, however, Akervik's testimony is merely a duplication of the testimony given by his companion, McCraw. The record of the trial here reveals no acts of McCraw by which he aided, abetted, or advised the participants in the act of unnatural carnal copulation. McCraw's testimony, added to that of McRoberts and Hopkins, supplies the corroboration which was lacking in the *Goldstein* case.

Appellant at the time of trial neither made objection to instruction No. 8 nor made request for an instruction on Akervik or McCraw as accomplices. (TR 141.) Such objections, in the absence of clear error, are required for a reversal on appeal. *Herzog v. U. S.*, 226 F. 2d 561, opinion adhered to 235 F. 2d 664, cert. den. 77 S.Ct. 54, 352 U.S. 844, 1 LEd 2d 59; *Bryson v. U. S.*, 238 F. 2d 657, reh. den. 233 F. 2d 837, cert. den. 78 S.Ct. 20, 355 U.S. 817, 2 LEd 2d 34, reh. den. 78 S.C. 138, 355 U.S. 879, 2 LEd 2d 110; *Pitts v. U. S.*, 237 F. 2d 217.

The Court's instruction, titled "Additional Instruction to the Jury", cited by appellant as reversible error was given to the jury when its members reported they were deadlocked in reaching a verdict. (TR 145, 146, and quoted on pages 15-17 of appellant's brief.) This instruction has been approved by the Court of Appeals for the Ninth Circuit in *Hutson v. U. S.*, 238 F. 2d 167.

## III.

**THE TRIAL COURT PROPERLY ADMITTED GOVERNMENT'S EXHIBIT "A" CONSISTING OF A JUDGMENT OF PRIOR CONVICTION OF AN ATTEMPT TO COMMIT THE CRIME OF UNNATURAL CARNAL COPULATION AND AN AMENDED JUDGMENT REDUCING THE PUNISHMENT FOR THE CONVICTION.**

It is appellant's contention that it was reversible error for the trial Court to admit government's Exhibit "A" into evidence because, first, its purpose was to impeach the testimony of appellant when in fact there was nothing to impeach since appellant admitted her prior conviction on direct examination. As a second ground of error it is argued that the judgment had attached a notation as to the punishment awarded on the prior conviction.

On direct examination, appellant testified to a prior conviction. The offense was described by appellant as follows, "It was a morals charge here in Fairbanks several years ago. It had to do with going out with men." (TR 116.) In fact, as government Exhibit "A" showed, appellant had previously been convicted of a felony, to-wit, an attempt to commit the crime of unnatural carnal copulation.

Appellant's argument that the trial Court erred in permitting the government to introduce a record of conviction after appellant had admitted a conviction is based on the premises that the government is bound by such an admission of defendant and is foreclosed from presenting any further proof of conviction. Even if the trial Court was satisfied that the definition, "going out with men", be a sufficient statement

to apprise the jury that the appellant had been convicted of an attempt to commit the crime of unnatural carnal copulation, the government still had a right to introduce proof of a prior conviction. *Adamson v. People State of Calif.*, 67 S.Ct. 1672, 332 U.S. 46, 91 LEd 1903, reh. den. 68 S.Ct. 27, 332 U.S. 784, 92 LEd 367; *Bohol v. U. S.*, 227 F. 2d 330; *State v. Holloway*, 355 Mo. 217, 195 S.W. 2d 662. The government can introduce information from any part of the record for conviction including the punishment given. *Nichols v. Commonwealth*, 283 S.W. 2d 184; *White v. Commonwealth*, 312 Ky. 543, 228 S.W. 2d 426. Impeachment by a record of conviction is permitted by § 58-4-61, Alaska Compiled Laws Annotated, 1949. *Meeks v. U.S.*, 163 F. 2d 598.

Appellant supports contention of error by citing cases where the trial Court was overruled for entertaining questions by the jury concerning punishment. *Sukle v. People*, 107 Col. 269, 111 P. 2d 233, *Commonwealth v. Mills*, 350 Pa. 478, 39 A. 2d 572. These cases refer to a direct instruction by the Court in response to situations where the record shows the mind of the jury was entertaining the question of punishment as a factor in reaching a verdict. No such showing is made by the record here.

**CONCLUSION.**

For the reasons set forth above, appellee requests this Court to affirm the judgment of the District Court.

Dated, Fairbanks, Alaska,  
August 11, 1958.

Respectfully submitted,

GEORGE M. YEAGER,  
United States Attorney,

GEO. ALLEN McGRATH,  
Assistant United States Attorney,  
*Attorneys for Appellee.*

**(Appendix Follows.)**





## **Appendix.**



## Appendix

---

### ALASKA COMPILED LAWS ANNOTATED, 1949.

§ 58-4-61. IMPEACHMENT BY ADVERSE PARTY: EVIDENCE PERMISSIBLE. A witness may be impeached by the party against whom he was called, by a contradictory evidence, or by evidence that his general reputation for truth is bad, or that his moral character is such as to render him unworthy of belief, but not by evidence of particular wrongful acts; except that it may be shown by the examination of the witness or the record of the judgment that he has been convicted of a crime.

§ 65-9-10. UNNATURAL CRIMES: That if any person shall commit sodomy, or the crime against nature, or shall have unnatural carnal copulation by means of the mouth, or otherwise, either with beast or mankind of either sex, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one year nor more than ten years.

§ 66-13-59. CORROBORATION OF TESTIMONY OF ACCOMPLICE. That a conviction can not be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely show the commission of the crime or the circumstances of the commission.

§ 66-13-62. QUESTIONS OF LAW FOR COURT: DECLARING KNOWLEDGE OF

COURT. That all questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the Court, and all discussions of law addressed to it; and whenever the knowledge of the Court is by this act made evidence of a fact, the Court is to declare such knowledge to the jury, who are bound to accept it as conclusive.

§66-13-63. JURY TO RECEIVE LAW FROM COURT AND DECIDE QUESTIONS OF FACT. That although the jury have the power to find a general verdict, which includes questions of law as well as fact, they are bound nevertheless, to receive as law what is laid down as such by the Court; but all questions of fact other than those mentioned in the last section must be decided by the jury, and all evidence thereon addressed to them.

No. 15971✓

---

United States  
Court of Appeals  
for the Ninth Circuit

---

WILSHIRE HOLDING CORPORATION,  
Petitioner,  
vs.  
COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

---

Transcript of Record

---

Petition to Review a Decision of the Tax Court  
of the United States

FILED

JUN - 4 1958



No. 15971

---

**United States**  
**Court of Appeals**  
for the Ninth Circuit

---

WILSHIRE HOLDING CORPORATION,  
Petitioner,  
vs.  
COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

---

**Transcript of Record**

---

**Petition to Review a Decision of the Tax Court  
of the United States**





## INDEX

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

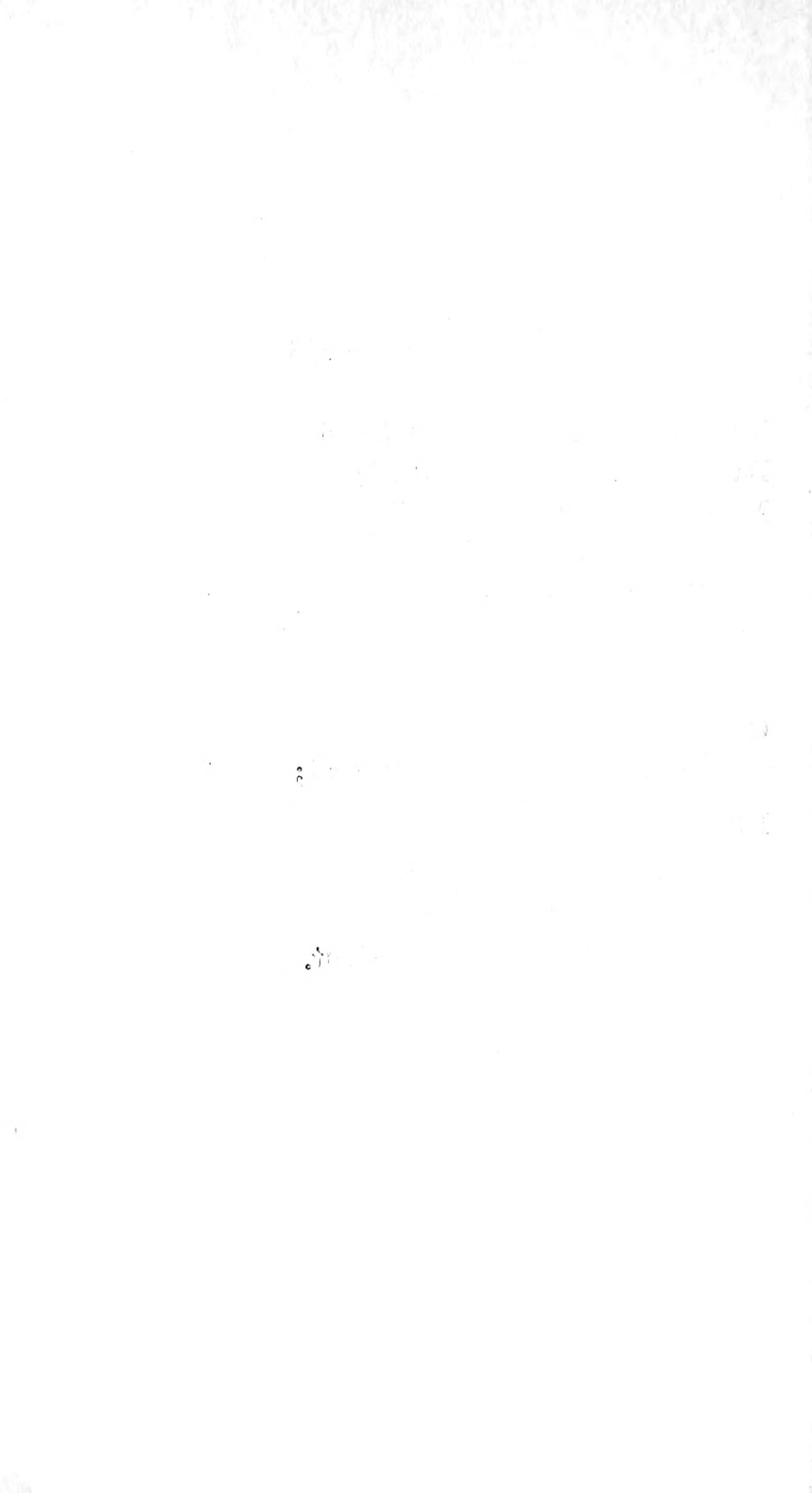
|  | PAGE |
|--|------|
| Appearances .....  | 1    |
| Certificate of Clerk.....  | 24   |
| Decision of the Tax Court.....   | 17   |
| Memorandum on Proposed Computations<br>for Entry of Decision Under Mandate.. | 18   |
| Motion for Entry of Decision Pursuant to<br>Mandate .....                    | 3    |
| Objections to Motion for Proposed Entry of<br>Decision .....                 | 4    |
| Affidavit of Chotiner, Murray M.....   | 4    |
| Petition for Review.....   | 20   |
| Petitioner's Computation of Alleged Tax<br>Liability .....                   | 6    |
| Ex. A—Computation of Proposed Income<br>Tax Deficiency .....                 | 8    |
| Statement of Points on Which Petitioner In-<br>tends to Rely on Appeal.....  | 22   |
| Transcript of Proceedings.....   | 12   |



## APPEARANCES

MURRAY M. CHOTINER and  
RUSSELL E. PARSONS, by  
MURRAY M. CHOTINER,  
202 S. Hamilton Dr.,  
Beverly Hills, Calif.,  
For the Petitioner.

CHARLES K. RICE,  
Asst. U. S. Attorney General;  
LEE A. JACKSON,  
Atty., Dept of Justice,  
Washington 25, D. C.,  
For the Respondent.



The Tax Court of the United States

Docket No. 32954

WILSHIRE HOLDING CORPORATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

MOTION FOR ENTRY OF DECISION  
PURSUANT TO MANDATE

Comes Now the Commissioner of Internal Revenue by his attorney, Nelson P. Rose, Chief Counsel, Internal Revenue Service, and moves the Tax Court to enter a decision pursuant to the mandate of the United States Court of Appeals for the Ninth Circuit that there are deficiencies of \$1,584.00 in declared value excess-profits tax, \$3,097.83 in excess-profits tax and \$1,834.06 in income tax, for 1945, and \$2,798.20 in income tax for 1946.

/s/ NELSON P. ROSE, C.A.R.  
Chief Counsel,  
Internal Revenue Service.

Received and Filed October 30, 1957, T.C.U.S.

Served November 13, 1957.

Entered November 13, 1957.

[Title of Tax Court and Cause.]

## OBJECTIONS TO MOTION FOR PROPOSED ENTRY OF DECISION

Comes Now Wilshire Holding Corporation by its attorneys, Murray M. Chotiner and Russell E. Parsons, and objects to the motion of respondent for its proposed entry of decision, based on the affidavit attached hereto and made a part hereof, and the files and records of the above-entitled action.

WILSHIRE HOLDING  
CORPORATION,

MURRAY M. CHOTINER and  
RUSSELL E. PARSONS,

By /s/ MURRAY M. CHOTINER,  
Attorneys for Petitioner.

## AFFIDAVIT OF MURRAY M. CHOTINER

State of California,  
County of Los Angeles—ss.

Murray M. Chotiner, being first duly sworn, deposes and says.

That he is one of counsel for petitioner Wilshire Holding Corporation. On October 14, 1957, the Supreme Court of the United States denied petitioner's petition for writ of certiorari to the United States Court of Appeals, for the Ninth Circuit, in connection with the above-entitled matter. That

thereafter and within the time provided for by the rules of the United States Supreme Court, petitioner filed a petition for rehearing of the petition for writ of certiorari, and that neither petitioner nor its counsel has received notice of any ruling by the Supreme Court of the United States on said petition for rehearing.

That the United States Court of Appeals for the Ninth Circuit, in reversing the decision of the Tax Court of the United States in the above-mentioned matter, stated in its opinion "Certainly a part of each payment is going toward the acquisition of this land and to this extent Wilshire Corporation does have an equity." That the Tax Court of the United States on November 5, 1957, made an order that the parties submit computations of the petitioner's tax liability in accordance with the opinion and judgment of the Court of Appeals based on the mandate remanding the cause for further proceedings in conformity with the opinion and judgment of the Court of Appeals.

Therefore, on a remanding of the case to the Tax Court of the United States it is respectfully urged that it is incumbent on the Tax Court of the United States to make a determination of what part of each payment is going toward the acquisition of the land and to what extent Wilshire Holding Corporation does have an equity.

In this action title to real property appraised at from \$50,000 to \$75,000 passes after the payment in

excess of \$679,000, and it is therefore necessary to determine what portion of the payments shall be charged to capital as the purchase price of the real property and what portion shall be charged to a deductible expense as rent or interest.

/s/ MURRAY M. CHOTINER.

Subscribed and Sworn to before me this 20th day of November, 1957.

[Seal] /s/ CHARLOTTE B. SARANOW,  
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires August 15, 1961.

Received and Filed November 22, 1957, T.C.U.S.

Served November 27, 1957.

Entered November 27, 1957.

---

[Title of Tax Court and Cause.]

### PETITIONER'S COMPUTATION OF ALLEGED TAX LIABILITY

Comes Now the petitioner, Wilshire Holding Corporation, by its attorneys, Murray M. Chotiner and Russell E. Parsons, and submits the following computation of petitioner's alleged tax liability in accordance with the opinion and judgment of the



United States Court of Appeals for the Ninth Circuit.

The computations are submitted in the alternative, depending on the decision of the Tax Court as to the method which should be used to determine the alleged liability.

The computations are based on the attached schedule, marked "Exhibit A" and made a part hereof; and on the opinion of the United States Court of Appeals for the Ninth Circuit in reversing the decision of the Tax Court of the United States in the above-mentioned matter, in which it stated, "Certainly a part of each payment is going toward the acquisition of this land and to this extent Wilshire Corporation does have an equity."

The figure of \$75,000.00 as constituting the value of the land when the contract was drawn in 1929 is the highest valuation placed on the property for that year, (Tr., p. 74, Dep., pp. 18, 46.)

That under Alternate Plan 1 there is an income tax deficiency of \$259.76, and a declared value excess-profits tax deficiency of \$146.30 for the year 1945, and an income tax deficiency of \$254.91 for the year 1946.

That under Alternate Plan 2 there is an income tax deficiency of \$310.47, and a declared value excess-profits tax deficiency of \$174.86 for the year 1945, and an income tax deficiency of \$304.68 for the year 1946.

Dated this 9th day of January, 1958.

Respectfully submitted,

WILSHIRE HOLDING  
CORPORATION,MURRAY M. CHOTINER and  
RUSSELL E. PARSONS,By /s/ MURRAY M. CHOTINER,  
Attorneys for Petitioner.

## “EXHIBIT A”

Wilshire Holding Corporation  
Computation of Proposed Income Tax Deficiency  
1945 and 1946  
Alternate 1

## Adjusted Net Income Computation

|   | 1945        | 1946        |
|---|-------------|-------------|
| Net income, per return filed....  | \$13,615.76 | \$ 9,910.28 |
| Proposed increase in net income (arising from annual capitalization of 12/212ths of \$75,000.00 value of land; length of lease 212 months.. | 1,108.37    | 1,108.37    |
| Net income, as adjusted .....   | \$14,724.13 | \$11,018.65 |
| Less: Declared value excess profits tax .....   | 623.58      |             |
| Net income .....  | \$14,100.55 |             |
| Less: Adjusted excess profits net income .....  | .00         |             |
| Normal tax and surtax net income .....  | \$14,100.55 | \$11,018.65 |

Normal Tax Computation

|                        |           |           |
|------------------------|-----------|-----------|
| \$ 5,000.00 @ 15%..... | \$ 750.00 | \$ 750.00 |
| 9,100.55 @ 17%.....    | 1,547.09  |           |
| 6,018.65 @ 17%.....    |           | 1,023.17  |

Surtax Computation

|                                 |            |             |
|---------------------------------|------------|-------------|
| \$14,100.55 @ 10%.....          | 1,410.06   |             |
| 11,018.65 @ 6%.....             |            | 661.11      |
| <hr/>                           |            | <hr/>       |
| Total income tax, proposed .... | \$3,707.15 | \$2,434.28  |
| Income tax paid .....           | 3,447.39   | 2,179.37    |
| <hr/>                           |            | <hr/>       |
| Income tax deficiency .....     | \$ 259.76  | \$ 254.91   |
|                                 |            | <hr/> <hr/> |

Declared Value Excess-Profits Tax

|                                  |           |             |
|----------------------------------|-----------|-------------|
| Deficiency (\$623.58 – \$477.28) | 146.30    |             |
| <hr/>                            |           |             |
| Total Deficiency .....           | \$ 406.06 | \$ 254.91   |
|                                  |           | <hr/> <hr/> |

Wilshire Holding Corporation

Computation of Proposed Income Tax Deficiency  
1945 and 1946

Alternate II—Schedule I

Adjusted Net Income Computation

|   | 1945        | 1946        |
|---|-------------|-------------|
| Net income, per return filed....  | \$13,615.76 | \$ 9,910.28 |
| Proposed increase in net income (arising from annual capitalization of pro-rata part of payments under lease; per schedule) ..... | 1,324.74    | 1,324.74    |
| <hr/>   |             | <hr/>       |
| Net income, as adjusted .....   | \$14,940.50 | \$11,235.02 |
|   |             | <hr/> <hr/> |

|  |                    |                    |
|--|--------------------|--------------------|
| Less: Declared value excess profits tax .....  | 652.14             |                    |
| Net income .....                               | <u>\$14,288.36</u> |                    |
| Less: Adjusted excess profits net income ..... | .00                |                    |
| Normal tax and surtax net income .....         | <u>\$14,288.36</u> | <u>\$11,235.02</u> |

## Normal Tax Computation

|                        |           |           |
|------------------------|-----------|-----------|
| \$ 5,000.00 @ 15%..... | \$ 750.00 | \$ 750.00 |
| 9,288.36 @ 17%.....    | 1,579.02  |           |
| 6,235.02 @ 17%.....    |           | 1,059.95  |

## Surtax Computation

|                        |          |        |
|------------------------|----------|--------|
| \$14,288.36 @ 10%..... | 1,428.84 |        |
| 11,235.02 @ 6%.....    |          | 674.10 |

|                                |                 |                 |
|--------------------------------|-----------------|-----------------|
| Total income tax proposed..... | \$3,757.86      | \$2,484.05      |
| Income tax paid .....          | <u>3,447.39</u> | <u>2,179.37</u> |
| Income tax deficiency .....    | \$ 310.47       | \$ 304.68       |

## Declared Value Excess-Profits Tax

|                                  |                  |                  |
|----------------------------------|------------------|------------------|
| Deficiency (\$652.14 - \$477.28) | 174.86           |                  |
| Total Deficiency .....           | <u>\$ 485.33</u> | <u>\$ 304.68</u> |

## Wilshire Holding Corporation

## Alternate II—Schedule II

## Computation of Part of Each Payment Going Toward Acquisition of Land Prorated on Basis of Varying Annual Payments

| Year of Lease | Fiscal Year Ended August 31 | Total Payments Under Lease | Pro Rata Part of Payments Going Toward Acquisition Total | Annual    |
|---------------|-----------------------------|----------------------------|--|-----------|
| 1 through 10  | 1929-1939                   | \$ 75,000.00               | \$ 8,279.61  | \$ 827.96 |
| 11 through 28 | 1939-1957                   | 216,000.00                 | 23,845.27  | 1,324.74  |
| 29            | 1958                        | 11,922.60                  | 1,316.19   |           |
| 30            | 1959                        | 11,809.20                  | 1,303.67   |           |
| 31            | 1960                        | 11,695.80                  | 1,291.16   |           |

|    |      |              |             |
|----|------|--------------|-------------|
| 32 | 1961 | 11,582.40    | 1,278.64    |
| 33 | 1962 | 11,469.00    | 1,266.12    |
| 34 | 1963 | 11,355.60    | 1,253.60    |
| 35 | 1964 | 11,242.20    | 1,241.08    |
| 36 | 1965 | 11,128.80    | 1,228.56    |
| 37 | 1966 | 11,015.40    | 1,216.04    |
| 38 | 1967 | 10,902.00    | 1,203.52    |
| 39 | 1968 | 10,788.60    | 1,191.00    |
| 40 | 1969 | 10,675.20    | 1,178.49    |
| 41 | 1970 | 10,561.80    | 1,165.97    |
| 42 | 1971 | 10,448.40    | 1,153.45    |
| 43 | 1972 | 10,335.00    | 1,140.93    |
| 44 | 1973 | 10,221.60    | 1,128.41    |
| 45 | 1974 | 10,108.20    | 1,115.89    |
| 46 | 1975 | 9,994.80     | 1,103.37    |
| 47 | 1976 | 9,881.40     | 1,090.86    |
| 48 | 1977 | 9,768.00     | 1,078.34    |
| 49 | 1978 | 9,654.60     | 1,065.82    |
| 50 | 1979 | 9,541.20     | 1,053.30    |
| 51 | 1980 | 9,427.80     | 1,040.78    |
| 52 | 1981 | 9,314.40     | 1,028.26    |
| 53 | 1982 | 9,201.00     | 1,015.74    |
| 54 | 1983 | 9,087.60     | 1,003.22    |
| 55 | 1984 | 8,974.20     | 990.70      |
| 56 | 1985 | 8,860.80     | 978.19      |
| 57 | 1986 | 8,747.40     | 965.67      |
| 58 | 1987 | 8,634.00     | 953.15      |
| 59 | 1988 | 8,520.60     | 940.63      |
| 60 | 1989 | 8,407.20     | 928.11      |
| 61 | 1990 | 8,293.80     | 915.59      |
| 62 | 1991 | 8,108.40     | 895.12      |
| 63 | 1992 | 8,067.00     | 890.55      |
| 64 | 1933 | 7,953.60     | 878.04      |
| 65 | 1944 | 7,840.20     | 865.52      |
| 66 | 1995 | 7,726.80     | 853.00      |
| 67 | 1996 | 7,613.40     | 840.48      |
| 68 | 1997 | 7,500.00     | 827.96      |
|    |      | <hr/>        | <hr/>       |
|    |      | \$679,380.00 | \$75,000.00 |
|    |      | <hr/>        | <hr/>       |

Received and filed January 13, 1958, T.C.U.S.

Served January 13, 1958.

Tax Court of the United States

Docket No. 32954

WILSHIRE HOLDING CORPORATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

## TRANSCRIPT OF PROCEEDINGS

Wednesday, January 29, 1958

Before: Hon. J. Edgar Murdock, Chief Judge.

## Appearances:

MURRAY M. CHOTINER, ESQUIRE,

Beverly Hills, California,

Appearing on Behalf of Petitioner.

JOHN MORAWSKI, ESQUIRE,

(Hon. Nelson P. Rose, Chief Counsel, Internal Revenue Service),

Washington, D. C.,

Appearing for Respondent.

The Clerk: Docket 32954, Wilshire Holding Corporation.

The Court: May we have your appearances?

Mr. Chotiner: Murray M. Chotiner, for the Petitioner.

Mr. Morawski: John Morawski, for the Respondent.

The Court: What is this, a contested settlement?

Mr. Morawski: Yes, sir.

The Court: And you do not agree as to how it is to be computed?

Mr. Morawski: That is correct.

Mr. Chotiner: The government contends the full amount paid is a nondeductible item, and under the opinion of the Ninth Circuit we contend that a portion is deductible, and that it is incumbent upon the Tax Court to determine which is and which is not deductible.

We filed two schedules to show that if we take the payment of \$75,000.00——

The Court: I understand what you are talking about.

Mr. Chotiner: This was a lease between the Wilshire Holding Corporation and Wallbecker Oesterreich and we contend the \$12,000.00 per year paid under the contract represents deductible expenses as rent.

The Court: They were going to pay her so much per year, \$12,000.00?

Mr. Chotiner: That is correct.

Your Honor held it was a lease, and the Ninth Circuit reversed the ruling, holding that it was not, and there were two cases, and——

The Court: It is not a lease, so they can buy the property from her, according to the Ninth Circuit?

Mr. Chotiner: That is correct, your Honor.

The Court: And the \$12,000.00 paid each year,

the Court said some part is purchase price, and some is rent?

Mr. Chotiner: It says, "Certainly a part of each payment is going toward the acquisition of this land, and to which extent Wilshire Corporation does have an equity."

Under the terms of the contract Wilshire was paying \$679,000.00 in round figures, and the question is, since the highest appraised value given at the time of the hearing was \$75,000.00 at the time the lease was entered into in 1929 it is our contention that the amount amortized over the total length of the lease of the land should be the portion considered as going toward the acquisition of the land, and we are given two possible contingencies, one to take a straight line computation of \$75,000.00 divided by two hundred twelve months, and taking two hundred twelve months on the alternative plan—it doesn't make much difference—is to take the \$75,000.00 as applied to the \$679,000.00, which is the total amount to be paid under the contract, and apportioning that figure over the 212 months and determining what is going toward acquisition of the principal.

The Court: You are taking the statement of the Court to mean that not all of it is purchase price?

Mr. Chotiner: That is correct, your Honor.

The Court: That is the basis upon which it was adjudicated?

Mr. Chotiner: Yes, sir, and as a matter of fact I think this Court was right, and that the Circuit Court was wrong. But, even taking the decision of



the Ninth Circuit that sentence stands out so boldly there can be no contention as to what was meant there.

That is our position, your Honor.

The Court: Have you anything to say, Mr. Morawski?

Mr. Morawski: Yes, your Honor.

The Ninth Circuit by memorandum dated December 6, 1956, reversed the Tax Court in the instant case of Wilshire upon the basis of its previous opinion in Wallbecker-Oesterreich. This opinion on Oesterreich was handed in October, 1955.

The Oesterreich and Wilshire cases were consolidated before the Tax Court and the Tax Court held that it was a lease, and that these twelve-thousand dollar payments were ordinary income for Mrs. Oesterreich, and were deductible business expenditures to Wilshire.

Mrs. Oesterreich appealed to the Ninth Circuit, and the Commissioner appealed the Wilshire case in order to protect itself in the event of the appeal on the Oesterreich case.

The issue before the Ninth Circuit in the Oesterreich case was whether Mrs. Oesterreich is entitled to treat the twelve-thousand dollar payments as long term capital gain, and conversely whether Wilshire is entitled to treat the payments as non-deductible business expenses under Section 23 (A) (1) (A), or merely as non-deductible capital expenditures.

The Ninth Circuit held this agreement was a contract of sale rather than a lease and further held the twelve-thousand dollar payments are taxable as

long term capital gain by Mrs. Oesterreich, and non-deductible expenditures to Wilshire. Therefore, under the mandate of the Circuit Court it should include the setting forth of a notice of deficiency.

Now, final decision was entered in Mrs. Oesterreich's case on July 31, 1956, on the basis of treating these payments as long term capital gain, and we contend consistent treatment should now be made in the instant case as non-deductible capital expenditures. This will call for the Tax Court finding the same deficiency determined by the Commissioner.

The Tax Court allocated some thirteen-hundred dollars to the land value appraised at \$75,000.99 in 1929. Counsel claims only to the extent of this thirteen-hundred dollars these eighteen-thousand-dollar payments are not deductible, and to the extent of the remainder of the payments some \$10,700.00 they are payable. Your Honor, there is no basis in the record for any such break down.

The Court: Anything else?

Mr. Morawski: Well, this case went up to the Supreme Court under certiorari and was denied, your Honor. In the motion for rehearing before the Supreme Court I think counsel for the first time requested the Supreme Court to remand the case to the Ninth Circuit or to the Tax Court for the purpose of making a break down. That was denied.

The Court: I will study it. Offhand I do not see any way out of it at this point, except to approve the Commissioner's deficiency, because I gave my

best the first time and apparently I was wrong, so that it looks to me in this case you have lost.

But I will study it. The hearing is concluded.

(Whereupon, at 10:15 o'clock a.m. the hearing in the above-entitled matter was concluded.)

Filed January 30, 1958, T.C.U.S.

---

Tax Court of the United States  
Washington

Docket No. 32954

WILSHIRE HOLDING CORPORATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

For reasons set forth in a memorandum accompanying this decision, it is

Ordered and Decided, that there are deficiencies of \$1,584.00 in declared value excess-profits tax, \$3,097.83 in excess-profits tax and \$1,834.06 in income tax, for 1945, and a deficiency of \$2,798.20 in income tax for 1946.

/s/ J. MURDOCK,

Judge.

[Title of Tax Court and Cause.]

MEMORANDUM ON PROPOSED COMPUTA-  
TIONS FOR ENTRY OF DECISION  
UNDER MANDATE

This case is before the Court on a dispute between the parties as to the computation of the deficiencies for the years 1945 and 1946 pursuant to the mandate of the United States Court of Appeals for the Ninth Circuit filed on October 28, 1957. That mandate reversed the decision of this Court entered June 8, 1953, on the "previous determination and opinion" of the United States Court of Appeals for the Ninth Circuit in the companion case of *Walburga Oesterreich v. Commissioner*, 226 F. 2d 798 (48 A.F.T.R. 335). The Court of Appeals for the Ninth Circuit, in reversing this Court, (Memorandum Findings of Fact and Opinion entered March 16, 1953), held that the agreement between Oesterreich and this petitioner constituted a sale and not a lease and payments by this petitioner were not deductible rent but constituted part of the purchase price and receipt of the payments by Oesterreich was long-term capital gain rather than ordinary income.

The petitioner here urges that in the course of its opinion the Court of Appeals stated, "Certainly a part of each payment is going toward the acquisition of this land and to this extent Wilshire Corporation does have an equity." The petitioner is of the view that this statement means that not all of the payment was purchase price and it would re-

quire an adjustment in the decisions to be entered by this Court.

The petitioner has taken the language of the Court of Appeals out of context and misconstrued it. The Court of Appeals made the quoted statement in its effort to answer the position taken by the Tax Court that an equity had not yet been acquired by the petitioner because the amount due on the remaining portion of the lease greatly exceeded the appraised value of the property. The Court of Appeals was of the opinion that, since there was a payment of approximately \$160,000 to Oesterreich from 1929 to 1946, and in 1997 the petitioner would acquire property appraised at \$100,000 in 1946, and perhaps worth ten times that amount in 1997, "a part of each payment is going toward the acquisition of this land and to this extent Wilshire Corporation does have an equity."

This is of no moment because the Court of Appeals held that the petitioner was taking title to the property within the meaning of section 23(a)(1)(A) and that alone was "sufficient to disqualify the 'rental' payments from being treated as a business expense."

Accordingly, the computations of the petitioner, filed January 13, 1958, are rejected and the decision will be entered in accord with the Commissioner's computations filed October 30, 1957.

/s/ J. MURDOCK,

Judge.

Dated Washington, D. C., February 6, 1958.

Entered February 6, 1958.

Served February 6, 1958.

[Title of Tax Court and Cause.]

## PETITION FOR REVIEW

Petitioner, Wilshire Holding Corporation, respectfully petitions the United States Court of Appeals for the Ninth Circuit to review the adverse decision of the Tax Court of the United States entered on February 6, 1958, ordering deficiencies of \$1,584.00 in declared value excess-profits tax, and \$1,834.06 in income tax, for 1945, and a deficiency of \$2,798.20 in income tax for 1946.

Petitioner alleges:

### I.

The controversy herein involves one question:

Is the computation for entry of decision under mandate in accord with the opinion and decision of the United States Court of Appeals for the Ninth Circuit rendered in the companion case of *Walburga Oesterreich v. Commissioner*, 226 F. 2d 798, which was used as the basis of reversing the decision of the Tax Court on motion in the within case?

The Circuit Court held that the contract between Oesterreich and petitioner constituted a sale of real property instead of a lease.

Petitioner contends that the opinion of the Circuit Court stating, "Certainly a part of each payment is going toward the acquisition of this land and to this extent Wilshire Corporation does have an equity," means that only a portion of each pay-

ment under the contract is to be capitalized in determining the reassessment of taxes owing by Wilshire Holding Corporation.

## II.

Petitioner contends the computation of the deficiency should be on the following basis:

A. The highest valuation placed on the land in 1929, the date of the contract, was \$75,000.00.

B. The length of the contract is 812 months.

C. The capitalization for each year should therefore be  $12/812$ ths of \$75,000.00.

The total amount to be paid under the contract is \$679,380.00. Obviously, the parties never intended, nor should the Court contend, that \$679,380.00 was to be paid for land appraised at \$75,000.00. Petitioner contends this is particularly true in the light of the fact that this is a single-purpose building (a motion picture theatre building) desperately trying to hold its own against the crushing development of television.

## III.

On the foregoing formula, there is an income tax deficiency of \$259.76, and a declared value excess-profits tax deficiency of \$146.30 for the year 1945, and an income tax deficiency of \$254.91 for the year 1946.

## IV.

The income tax returns for the years 1945 and 1946 involved in this proceeding were filed by the

petitioner in the office of the Collector of Internal Revenue for the Sixth Collection District of California, being the place where the place of business of petitioner is located, the same being in the Ninth Circuit of the United States Court of Appeals.

Petitioner herein respectfully submits that the decision of the Tax Court of the United States computing the alleged tax liability was erroneous and requests the United States Court of Appeals for the Ninth Circuit to review said decision of the Tax Court of the United States.

Dated this 25th day of February, 1958.

MURRAY M. CHOTINER and  
RUSSELL E PARSONS,

By /s/MURRAY M. CHOTINER,  
Attorneys for Petitioner.

Affidavit of service by mail attached.

Received and filed February 27, 1958, T.C.U.S.

---

[Title of Tax Court and Cause.]

STATEMENT OF POINTS ON WHICH PETITIONER INTENDS TO RELY ON APPEAL

I.

The Circuit Court of the United States for the Ninth Circuit in heretofore reversing the decision



of the Tax Court of the United States held that a part of each payment made by petitioner to Walburga Oesterreich under the contract went toward the acquisition of the land and to this extent petitioner was acquiring an equity.

## II.

The highest appraised value of the land in 1929, the year of the contract, was \$75,000.00; since the total payments required to be made under the 812-month contract of \$679,380.00 is exorbitantly higher than the value of the land, it follows that the equity being acquired each year is  $12/812$ ths of \$75,000.00.

## III.

The non-deductible payment each year to be capitalized is \$1108.37 which goes toward acquiring an equity in the property.

Dated this 25th day of February, 1958.

MURRAY M. CHOTINER and  
RUSSELL, E. PARSONS,

By /s/ MURRAY M. CHOTINER,  
Attorneys for Petitioner.

Received and filed February 27, 1958, T.C.U.S.

[Title of Tax Court and Cause.]

### CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 10, inclusive, constitute and are all of the original papers on file in my office as called for by the "Request for and Designation of Record and Proceedings to be Contained in Record for Review" and "Designation of Additional Portions of Record" (excepting items 1 and 2 of the designation which are not of record in this Court) in the case before the Tax Court of the United States docketed at the above number and in which petitioner in the Tax Court has filed a petition for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case as the same appear in the official docket in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 10th day of March, 1958.

[Seal]      /s/ HOWARD P. LOCKE,  
Clerk, Tax Court of the  
United States.

[Endorsed]: No. 15971. United States Court of Appeals for the Ninth Circuit. Wilshire Holding Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed April 1, 1958.

Docketed April 9, 1958.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.



No. 15971

IN THE

**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

WILSHIRE HOLDING CORPORATION,

*Petitioner and Appellant,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent and Appellee.*

---

Petition to Review a Decision of the Tax Court of the  
United States.

---

**APPELLANT'S OPENING BRIEF.**

---

MURRAY M. CHOITNER and

RUSSELL E. PARSONS,

600 Fox Wilshire Theatre Bldg.,

202 South Hamilton Drive,

Beverly Hills, California,

*Attorneys for Appellant,*

*Wilshire Holding Corporation.*

**FILED**

**JUL - 2 1958**

**PAUL P. O'BRIEN, CLERK**

1941-1942

## TOPICAL INDEX

|   | PAGE |
|---|------|
| Statement of the case.....  | 1    |
| Jurisdiction .....  | 1    |
| Statement of facts.....   | 2    |
| Specification of error.....   | 4    |
| Question presented by appellant.....  | 4    |
| Argument .....  | 4    |
| The computation of tax deficiencies by the Tax Court was<br>erroneous ..... | 4    |
| Conclusion .....  | 6    |

---

## TABLE OF AUTHORITIES CITED

| CASE  | PAGE    |
|---|---------|
| Oesterreich, Walburga, v. Commissioner of Internal Revenue,<br>226 F. 2d 798..... | 2, 4, 5 |

| STATUTE   |   |
|---|---|
| United States Code, Title 26, Sec. 7482(a) (b) (1)..... | 1 |





No. 15971  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

WILSHIRE HOLDING CORPORATION,  
*Petitioner and Appellant,*  
*vs.*  
COMMISSIONER OF INTERNAL REVENUE,  
*Respondent and Appellee.*

---

**Petition to Review a Decision of the Tax Court of the  
United States.**

---

**APPELLANT'S OPENING BRIEF.**

---

**Statement of the Case.**

This is an appeal from the decision of the Tax Court of the United States holding that there are deficiencies of \$1,584.00 in declared value excess-profits tax, \$3,097.83 in excess-profits tax, and \$1,834.06 in income tax for 1945, and a deficiency of \$2,798.20 in income tax for 1946 [Tr. of R. p. 17].

**Jurisdiction.**

The jurisdiction of this Court is invoked under Title 26, United States Code, Section 7482(a)(b)(1). The pleadings relied on are Motion for Entry of Decision Pursuant to Mandate, Objections to Motion for Proposed Entry of Decision, Petitioner's Computation of

Alleged Tax Liability, Petition for Review, and Statement of Points On Which Petitioner Intends to Rely on Appeal [Tr. of R. pp. 3, 4-6, 6-11, 20-22, 22-23].

The tax returns for the years involved were filed with the Collector of Internal Revenue for the Sixth District of California [Tr. of R. pp. 21-22].

### Statement of Facts.

(Note: The Transcript of Record on p. 8 states, "Proposed increase in net income arising from annual capitalization of 12/212ths of \$75,000 value of land; length of lease 212 months". The figures 212 in both instances should read 812.)

In the case of Commissioner of Internal Revenue vs. Wilshire Holding Corporation, No. 14,100 of the United States Court of Appeals for the Ninth Circuit, the Circuit Court granted a motion of the Commissioner to summarily reverse the decision of the Tax Court.

The case was consolidated in the Tax Court with the case of Walburga Oesterreich vs. Commissioner of Internal Revenue, No. 13,924. Pursuant to a stipulation of the parties, proceedings on appeal in case No. 14,100 were held in abeyance pending the decision of the Court in the Oesterreich case No. 13924.

The Circuit Court, in the case of *Walburga Oesterreich v. Commissioner of Internal Revenue*, 226 F. 2d 798, held that the contract between Oesterreich and Wilshire Holding Corporation constituted a sale of real property, instead of a lease.

The decision in the Oesterreich case was the basis for granting the motion of the Commissioner to sum-

marily reverse the Tax Court in the Wilshire Holding Corporation case.

After the ruling was made summarily reversing the Tax Court, the Commissioner made a Motion for Entry of Decision Pursuant to Mandate [Tr. of R. p. 3].

Objections to the Motion for Proposed Entry of Decision were filed by Wilshire Holding Corporation on the basis that it is incumbent on the Tax Court to make a determination of what part of each payment is going toward the acquisition of the land and to what extent Wilshire Holding Corporation has an equity [Tr. of R. pp. 4-6].

Petitioner filed a computation of alleged tax liability [Tr. of R. pp. 6-11], showing the income tax deficiency under two alternate plans. The computations submitted by the petitioner were based on a schedule marked "Exhibit A" [Tr. of R. pp. 8-11]; and on the opinion of the United States Court of Appeals, reversing the decision of the Tax Court of the United States in the Oesterreich case, wherein the Court stated, "Certainly a part of each payment is going toward the acquisition of this land, and to this extent Wilshire Corporation does have an equity". 226 F. 2d 798, 803.

The Tax Court, in its decision, held that the language of the Court of Appeals was misconstrued, and the Tax Court made its determination of deficiencies owing on the basis that the entire payment by Wilshire Holding Corporation to Oesterreich was subject to capitalization, instead of any portion of it being deductible as an expense [Tr. of R. pp. 17-19].

Petitioner filed its Petition for Review to review the adverse decision of the Tax Court, entered on February

6, 1958, ordering deficiencies sought by the Commissioner in his Motion for Entry of Decision, wherein complete disallowance was made of all payments from Wilshire Holding Corporation to Oesterreich [Tr. of R. pp. 20-22].

### **Specification of Error.**

The Tax Court erred in computing the tax deficiencies on the basis that the entire payments under the contract between Wilshire Holding Corporation and Oesterreich are to be capitalized and that no part of them may be deducted as an expense.

### **Question Presented by Appellant.**

Is the computation of tax deficiencies for entry of decision under mandate in accord with the opinion and decision of the United States Court of Appeals for the Ninth Circuit rendered in the case of *Walburga Oesterreich v. Commissioner*, 226 F. 2d 798, which was used by the Court as the basis for summarily reversing the decision of the Tax Court in the within case?

### **ARGUMENT.**

#### **The Computation of Tax Deficiencies by the Tax Court Was Erroneous.**

The United States Court of Appeals for the Ninth Circuit, in its opinion and decision rendered in the companion case of *Walburga Oesterreich v. Commissioner*, 226 F. 2d 798, held that the contract between Oesterreich and Wilshire Holding Corporation constituted a sale of real property instead of a lease.

It was this decision that was used by the Circuit Court as the basis of summarily reversing the decision of the Tax Court in the case of *Commissioner vs. Wilshire Holding Corporation*, No. 14,100.

The Circuit Court in its Opinion stated, "Certainly a part of each payment is going toward the acquisition of this land and to this extent Wilshire Corporation does have an equity". *Oesterreich v. Commissioner*, 226 F. 2d 798, 803. Appellant contends that the quoted portion of the Circuit Court's Opinion means that only a portion of each payment made by Wilshire Holding Corporation to Oesterreich under the contract is to be capitalized in determining the reassessment of taxes owing by Wilshire Holding Corporation.

The highest value of the land in 1929, the date of the contract, was \$75,000 [Orig. Tr. p. 74; Dep. pp. 18, 46]; the length of the contract is 812 months. Therefore, the capitalization for each year should be  $12/812$ ths of \$75,000.

The total amount to be paid under the contract is \$679,380. Obviously, the parties never intended, nor should the Court contend, that \$679,380 was to be paid for land appraised at \$75,000. Petitioner contends this is particularly true in the light of the fact that the building in question is a single-purpose building (a motion picture theatre building), desperately trying to hold its own against the crushing development of television.

On the basis of the foregoing formula [Ex. A, Tr. of R. pp. 8-9], there is an income tax deficiency of \$259.76, and a declared value excess-profits tax deficiency of \$146.30 for the year 1945, and an income tax deficiency of \$254.91 for the year 1946.

The non-deductible payment each year to be capitalized is \$1,108.37, as shown in Exhibit A [Tr. of R. p. 8]. It is this "non-deductible payment" which goes toward acquiring an equity in the property appraised at \$75,000 in 1929, the year of the contract.

### Conclusion.

The decision of the Tax Court determining the amount of deficiencies owing by Wilshire Holding Corporation should be reversed, and an order made determining the deficiency to be \$259.76 for income tax; and \$146.30 for declared value excess-profits tax for 1945, and \$254.91 for income tax for the year 1946; or the case should be remanded to the Tax Court for the purpose of making a determination of what part of each payment made by Wilshire Holding Corporation to Oesterreich is going toward the acquisition of the land and to what extent Wilshire Holding Corporation does have an equity, so it may be determined what portion of the payments shall be charged to capital as the purchase price of the real property, and what portion shall be charged to a deductible expense as rent or interest.

MURRAY M. CHOTINER, and  
RUSSELL E. PARSONS,

By MURRAY M. CHOTINER,  
*Attorneys for Appellant, Wilshire  
Holding Corporation.*

No. 15971

---

**In the United States Court of Appeals  
for the Ninth Circuit**

---

**WILSHIRE HOLDING CORPORATION, PETITIONER**

*v.*

**COMMISSIONER OF INTERNAL REVENUE, RESPONDENT**

---

**On Petition for Review of the Decision of the  
Tax Court of the United States**

---

**BRIEF FOR THE RESPONDENT**

---

**CHARLES K. RICE**  
*Assistant Attorney General*

**LEE A. JACKSON**  
**DAVID O. WALTER**  
*Attorneys*  
*Department of Justice*  
*Washington 25, D.C.*

---

**FILED**

**AUG - 1 1958**





## I N D E X

|   | Page |
|---|------|
| Opinion below .....   | 1    |
| Jurisdiction .....  | 1    |
| Question presented .....  | 2    |
| Statute involved .....  | 2    |
| Statement .....   | 3    |
| Summary of argument.....  | 4    |
| Argument:   |      |
| The Tax Court correctly interpreted the mandate<br>and opinion of this Court in deciding that no<br>part of the payments is deductible..... | 4    |
| Conclusion .....  | 8    |

## CITATIONS

### Cases:

|   |         |
|---|---------|
| <i>Commissioner v. Wilshire Holding Corp.</i> , 244 F.<br>2d 904, certiorari denied, 355 U.S. 815, rehear-<br>ing denied, 355 U.S. 879..... | 3, 4, 8 |
| <i>Oesterrich v. Commissioner</i> , 226 F. 2d 798.....  | 3, 4    |

### Statute:

|  |   |
|--|---|
| Internal Revenue Code of 1939, Sec. 23 (26<br>U.S.C. 1952 ed., Sec. 23)..... | 2 |
|--|---|



**In the United States Court of Appeals  
for the Ninth Circuit**

---

No. 15971

WILSHIRE HOLDING CORPORATION, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

---

**On Petition for Review of the Decision of the  
Tax Court of the United States**

---

**BRIEF FOR THE RESPONDENT**

---

**OPINION BELOW**

The memorandum on proposed computations for entry of decision under mandate of the Tax Court (R. 18-19) is not officially reported.

**JURISDICTION**

This petition for review (R. 20-22) involves federal declared value excess profits tax, excess profits tax, and income tax for 1945, and income tax for 1946. The total deficiencies amount to \$9,314.09. (R. 17.) This is the second petition for review of this case. The decision of the Tax Court, pursuant to the mandate of this Court, was entered on February 6,

1958. (R. 17-19.) The petition for review was filed on February 27, 1958. (R. 20-22.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

### QUESTION PRESENTED

Whether the Tax Court correctly construed the mandate and opinion of this Court in deciding that no part of the payments made by taxpayer to Walburga Oesterrich in 1945 and 1946 was deductible by taxpayer as rentals under Section 23(a)(1)(A) of the Internal Revenue Code of 1939.

### STATUTE INVOLVED

Internal Revenue Code of 1939:

#### SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a), [as amended by Sec. 121(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses*.—

(1) *Trade or business expenses*.—

(A) *In General*.— \* \* \* rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity. \* \* \*

\* \* \* \*

(26 U.S.C. 1952 ed., Sec. 23.)

## STATEMENT

In 1929, taxpayer's predecessor entered into an agreement entitled a "lease" with Walburga Oesterrich, owner of a tract of land in Beverly Hills, California, providing for monthly payments, over a period of 67 years and eight months, with an option in the lessee to take title, upon payment of \$10, at the end of that time. The issue in this case is as to the proper treatment of those payments for the years 1945 and 1946.

In *Oesterrich v. Commissioner*, 226 F. 2d 798, this Court held that the agreement was not a lease, but a contract for the sale of land, and that, therefore, Mrs. Oesterrich was entitled to treat the payments as long term capital gains rather than as ordinary income. Correspondingly, in *Commissioner v. Wilshire Holding Corp.*, 244 F. 2d 904, rehearing denied, April 15, 1957, certiorari denied, 355 U.S. 815, rehearing denied, 355 U.S. 879, it summarily reversed the decision of the Tax Court that taxpayer was entitled to deduct the payments as rentals under Section 23 (a) (1) (A) of the Internal Revenue Code of 1939.

In the Tax Court the Commissioner moved for entry of decision pursuant to the mandate of this Court (R. 3), computing the deficiencies on the basis that no part of the payments was deductible. Taxpayer objected to this motion, on the ground that a part of the payments was deductible as rentals, relying on certain language in this Court's opinion in the *Oesterrich* case (R. 4-6), and subsequently filed alternative computations of tax liability (R. 6-11). After a hearing (R. 12-17) the Tax Court rejected

the taxpayer's proposed computations and accepted those of the Commissioner. (R. 17).

### SUMMARY OF ARGUMENT

The Tax Court is correct in stating that the taxpayer has taken the language of this Court in its *Oesterrich* opinion out of context and misconstrued it. A mere reading of this Court's opinion shows that it intended to hold that no part of the annual payments by taxpayer is deductible under Section 23 (a)(1)(A) of the Internal Revenue Code of 1939. Furthermore, taxpayer's argument in support of its contention that a portion of the payments is deductible has previously been presented to this Court in the earlier stages of the present *Wilshire Holding Corp.* case. Taxpayer is in effect trying to reopen the entire matter after the decisions of this Court in both cases have become final.

### ARGUMENT

#### **The Tax Court Correctly Interpreted The Mandate And Opinion Of This Court In Deciding That No Part Of The Payments Is Deductible.**

We submit that the Tax Court's decision was correct and that its memorandum correctly states (R. 19) that taxpayer has taken the language of this Court out of context and misconstrued it.

For convenience, we quote from the opinion of this Court in *Oesterrich v. Commissioner*,<sup>1</sup> 226 F. 2d 798, 801, 802:

---

<sup>1</sup> In *Commissioner v. Wilshire Holding Corp.*, 244 F. 2d 904, 805, this Court based its determination upon the previous determination "and opinion" in the *Oesterrich* case.

There is only one issue presented by this case. Is petitioner entitled to treat "rental" payments made by "lessee" as long term capital gains or must she treat them as ordinary income? Conversely, is lessee, the Wilshire Holding Corp., entitled to treat these payments as a deductible business expense as defined by Int. Rev. Code Sec. 23(a)(1)(A), 26 U.S.C.A. § 23(a)(1)(A) or merely as non-deductible capital expenditures? The sole issue, therefore, is whether the agreement is a lease or a contract for the sale of land.

\* \* \* \*

The question before us remains whether petitioner is entitled to treat her rental payments as long term capital gains rather than rental income and conversely whether Wilshire Holding Corporation is entitled to deduct the payment as rental expense as defined by Sec. 23(a)(1)(A)

\* \* \* :

\* \* \* \*

The Court then quoted the language of Section 23(a)(1)(A) that to be deductible the rentals or other payments must be for the use of property to which the taxpayer has not taken "or is not taking title or in which he has no equity" and stated (p. 802) that—

these two provisions of Sec. 23(a)(1)(A) are stated in the alternative and the deduction cannot be availed of if Wilshire Holding Corporation has brought itself into either category prohibited by statute.

As to the first, the opinion states (p. 802):

There can be no doubt that Wilshire Holding Corporation is acquiring title to the premises.

The opinion subsequently discusses the second alternative (p. 803):

The alternative criterion under Sec. 23(a)(1)(A) which would prevent Wilshire Holding Corporation from treating the payments as a business expense is whether an equity in the property was acquired.

In the discussion of this alternative appears the language on which taxpayer now relies, as follows (p. 803):

Certainly a part of each payment is going toward the acquisition of this land and to this extent Wilshire Corporation does have an equity.

The discussion concludes with the following (p. 803):

However, even if the Tax Court was correct in holding that Wilshire has not acquired an equity, the alternative ground that they are taking title to the property is sufficient to disqualify the "rental" payments from being treated as a business expense.

Taxpayer now contends that this Court has determined that only a part of each payment is going toward the acquisition of the land, and that accordingly the rest of it must be deductible as rental. It then submits a formula for determining what part is rental, and so deductible.<sup>2</sup> (Br. 5.)

---

<sup>2</sup> Under the formula taxpayer would deduct approximately nine-tenths of each payment. Correspondingly, Mrs. Oestrich would be entitled to capital gains treatment of only about one-tenth.



It is obvious from the foregoing quotations from this Court's opinion that it did not hold that a part of each payment is rental and a part sale price, and that it did not determine the agreement was in part a lease and in part a contract of sale.

Furthermore, even if a part of each payment were to be denominated "rentals" under Section 23(a)(1)(A), taxpayer's cause would not be advanced, since under that section even "rentals" are not deductible if they are for the use of property in which the taxpayer has an equity.

In so far as taxpayer's formula is concerned, taxpayer appears to be arguing that the land was worth only \$75,000 in 1929, that it could not have intended to pay a total of \$679,380 for this land, and, accordingly the parties intended to sell the land for \$75,000. (Br. 5.) This assumption bears with it the assumption that the seller was willing to sell land worth \$75,000, for payments totalling \$75,000, but paid at the rate of about \$1,000 a year for nearly seventy years in the future, surely an unreasonable assumption. More important, the argument that the parties never intended the land to be sold for the total amount to be paid under the contract is foreclosed by this Court's decision that they did agree upon a sale of the land for the contract price.<sup>3</sup> Taxpayer's contentions on this point were repeatedly but unsuccessfully pressed on this Court, and on the Su-

---

<sup>3</sup> In the *Oesterrich* case (p. 803) the Court commented that—

No comparison of the value of the realty and the amount of rental paid at any given time has any validity.

preme Court in its petition for certiorari before the decision in *Commissioner v. Wilshire Holding Corp.*, 244 F. 2d 904, became final.

### CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

CHARLES K. RICE  
*Assistant Attorney General*

LEE A. JACKSON

DAVID O. WALTER  
*Attorneys*  
*Department of Justice*  
*Washington 25, D.C.*

JULY 1958

No. 15971.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

WILSHIRE HOLDING CORPORATION,

*Petitioner and Appellant,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent and Appellee.*

---

Petition to Review a Decision of the Tax Court of the  
United States.

---

## APPELLANT'S REPLY BRIEF.

---

MURRAY M. CHOTINER and

RUSSELL E. PARSONS,

600 Fox Wilshire Theatre Bldg.,

202 South Hamilton Drive,

Beverly Hills, California,

*Attorneys for Appellant,*

*Wilshire Holding Corporation.*

FILED

AUG 21 1958

PAUL P. O'BRIEN, CL.



## TOPICAL INDEX

|                  | PAGE |
|------------------|------|
| Conclusion ..... | 7    |

---

## TABLE OF AUTHORITY CITED

### CASE

|   |      |
|---|------|
| Oesterreich v. Commissioner of Internal Revenue, 226 F. 2d<br>798 ..... | 2, 3 |
|---|------|



No. 15971.

IN THE

**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

WILSHIRE HOLDING CORPORATION,

*Petitioner and Appellant,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent and Appellee.*

---

Petition to Review a Decision of the Tax Court of the  
United States.

---

**APPELLANT'S REPLY BRIEF.**

---

Appellee, in his Brief (p. 7), states that it is "surely an unreasonable assumption" that the seller (Oesterreich) was willing to sell land worth \$75,000 for payments totalling \$75,000, to be paid at the rate of about \$1,000 a year for nearly 70 years in the future.

The answer to this argument is simply this: The *real* unreasonableness of the situation is that the parties and their predecessors in interest thought they had entered into a lease and acted as though they had entered into a lease. They agreed that the sum of \$679,380 would be paid to Oesterreich for the use of property that was worth only \$75,000 at the time the contract was executed in 1929. For almost twenty years the parties or their predecessors in interest never had any question raised as to whether the contract was a lease.

The Tax Court agreed that it was a lease.

However, the Circuit Court saw fit to rewrite the contract so as to make it a sale instead of a lease. Therefore, in all equity, the Court in rewriting the lease, should determine what portion of the payments being made to Oesterreich constituted payments to acquire title, and what portion of the payments constituted interest, carrying charge or rent.

Appellant respectfully urges that it is a most unreasonable assumption and requirement that \$679,380 should be paid to acquire title to a piece of real property that no one contends was worth more than \$75,000 at the time the contract was executed.

The Circuit Court in its decision reversing the Tax Court stated clearly, "Certainly a *part* of each payment is going toward the acquisition of this land, and to *this extent* Wilshire Corporation does have an equity." (*Oesterreich v. Commissioner*, 226 F. 2d 798; italics ours.)

This language of the Court's opinion leaves no room for doubt that the Circuit Court felt that only a part of the \$679,380 was going toward the acquisition of title.

The language of the Court, together with salient features of the case showing that the parties did not intend a sale requires a further determination of what part of the payments is going toward the acquisition of title.

The salient features showing that the parties intended to lease are:

1. During the calendar years 1929 to 1946, inclusive, Wilshire Amusement Corporation and Wilshire Holding Corporation entered all amounts paid or payable on ac-



count of their obligations under Exhibit 1 as rental expenses upon their books of account, and reported said amounts as rental expense in their income tax returns for said years. [Stip. Par. 8, p. 35, and pp. 68-69.]\*

2. Wilshire Holding Corporation in its returns for the years under consideration here, 1945 and 1946, deducted the payments as rent. [Stip. Par. 10, p. 35.]

3. Oesterreich entered all amounts paid or payable by Wilshire Amusement Corporation and Wilshire Holding Corporation on account of their obligations under Exhibit 1 during the years 1929 to 1946, inclusive, as rental income upon her books of account, and reported said amounts as rental income on her income tax for said years. [Stip. Par. 9, p. 36; pp. 68, 126-127.]

4. In or about January of 1929 Albert J. Chotiner and Albert H. Chotiner informed W. Frank Moulton, who was at that time associated with the W. S. Hancock Company, that they proposed to construct a theatre in the Wilshire-La Cienega area and that they sought to enter into a long term ground lease for the land upon which the theatre would be built. [Dep. pp. 6, 11.]

5. Mr. Moulton, the real estate broker, canvassed the area and learned that Mrs. Oesterreich owned three lots on Wilshire and Hamilton. Mrs. Oesterreich informed Mr. Moulton that she was willing to enter into a long term lease but did not want to sell the land. [Dep. pp. 11, 33.]

6. Mr. Moulton reported back to the Chotiners and thereafter arranged a meeting between the parties in his

---

\*The references are to the record in the companion case of *Oesterreich v. Commissioner* (Circuit Court No. 13924), 226 F. 2d 798.

office which was cater-cornered from the Wilshire and Hamilton lots owned by Mrs. Oesterreich. [Pp. 144-145.]

7. The Chotiners informed Mrs. Oesterreich that they desired to build a 1200-seat house and that they wished to lease her land. Mrs. Oesterreich informed the Chotiners that she was willing to enter into a long term ground lease if suitable terms could be arranged. [Pp. 145, 148.]

8. During the course of the negotiations Mrs. Oesterreich on several occasions stated that she did not expect to be alive at the end of the term of the lease and was indifferent as to the disposition of the fee at that time but that she was interested in securing a substantial rental during her lifetime. [P. 154; Dep. pp. 24, 27, 50, 64.]

9. At no time during the course of the negotiations did the Chotiners offer to buy the land. [Pp. 134, 160, 165; Dep. pp. 23, 31.]

10. At no time during the course of the negotiations did Mrs. Oesterreich offer to sell the land. [P. 146; Dep. p. 22.]

11. At no time during the course of negotiations did either of the parties discuss the sale of the land. [P. 146; Dep. pp. 22, 24-25.]

12. At no time during the course of the negotiations did the parties discuss the value of the land. [Pp. 165-166; Dep. pp. 26-27.]

13. The land at the time that the lease was negotiated had a value of not less than \$50,000 and not more than \$75,000. [P. 74; Dep. pp. 18, 46.]

14. The real estate agent, Mr. Frank W. Moulton, was compensated by the landlord. He was paid a commission for finding a tenant and negotiating a lease. His original commission was computed on the basis of finding a tenant for his principal, Mrs. Oesterreich. [Dep. pp. 19-22, 56, 63.]

15. Oesterreich acquired title to Lots 552, 553, and 554, Tract No. 4988, as per Map recorded in Book 54, pages 98 and 99 of Maps, Official Records of Los Angeles County, by grant deeds dated January 9 and recorded January 30, 1926. Mrs. Oesterreich paid a total consideration of \$20,000.00 for said three lots. Prior to September 11, 1929, Mrs. Oesterreich expended a total sum of \$4,235.05 for paving and lighting assessments properly chargeable to capital account in respect to said lots, so that her adjusted basis for said lots on September 11, 1929, was \$24,235.05. [Stip. Par. 1, pp. 32-33.]

16. Wilshire Amusement Corporation caused the northerly 10 feet and the southerly 40 feet of Lot 555 of said Tract No. 4988 to be conveyed to Mrs. Oesterreich by grant deeds dated September 11, 1929, and recorded September 13, 1929. Wilshire Amusement Corporation caused the northerly 40 feet of Lot 556 of said Tract No. 4988 to be conveyed to Mrs. Oesterreich by grant deed dated October 20, 1929, and recorded November 15, 1929. Wilshire Amusement Corporation paid cash in the amount of \$19,150 for said parcels of land, plus the sum of \$500 for the removal of restrictions. [Stip. Par. 4, p. 34.]

17. The foregoing three parcels of land acquired by the Chotiners *et al.*, at an aggregate cost of \$19,650

were conveyed to Mrs. Oesterreich as part of the consideration for the making of the lease and its terms and as additional security for the performance of the terms, conditions and provisions of the lease. [Ex. 6.]

18. The building constructed by the lessee as required by the lease is situate on all five lots; the three lots belonging to Mrs. Oesterreich and the lots purchased by the Chotiners. [Pp. 131-132.]

To hold that all of the payments being made to Oesterreich are going toward acquiring title means that Wilshire Holding Corporation is paying a second time for the two lots purchased by the Chotiners and conveyed to Oesterreich. This would be a most unreasonable requirement. It is beyond all reasonable comprehension that a party should be expected to pay an exorbitant price to acquire land for which it had already paid a reasonable value.

19. The document embodying the agreement of the parties was thereafter duly recorded in the office of the County Recorder on November 19, 1929, as a lease. [Stip. Par. 3, p. 33.]

20. The lease in question was executed by the parties after consultation and upon advice of their legal counsel, Meyer Willner <sup>FOR</sup> from Mrs. Oesterreich and Mr. Binford for the Chotiners. [Pp. 110-111.]

21. Mrs. Oesterreich and Wilshire-Hamilton Properties, Inc., the predecessor of the Wilshire Holding Corporation, executed a deed of trust as security for the construction loan on November 1, 1929. The deed of trust referred to Mrs. Oesterreich as the "grantor" and stated that the "grantor is the owner" of the real property; that a leasehold interest was created by the lease

referred to as the "Oesterreich lease" dated September 11, 1929, executed by Walburga Oesterreich as lessor. [Ex. 7, pp. 114-115; p. 155.]

22. The ground rent payments made pursuant to the lease were paid to the Security-First National Bank of Los Angeles in accordance with the Assignment of Rents executed by Mrs. Oesterreich. [Ex. 14, pp. 169-170.]

23. Wilshire Holding Corporation and Mrs. Oesterreich have always heretofore considered the payments as rent as between themselves. [Stip. Pars. 8-9, p. 35; pp. 68-69, 126-127.]

### Conclusion.

Based on the Court's opinion reversing the Tax Court, appellant respectfully urges that its computation of the deficiencies due for income tax and declared value excess profits tax is correct; in the event the Court has any question as to the correctness of the computation, the matter should be remanded to the Tax Court for the purpose of making a determination of what part of each payment made by Wilshire Holding Corporation to Oesterreich is going toward the acquisition of the land so it may be determined what portion of the payments shall be charged to capital as the purchase price.

Respectfully submitted,

MURRAY M. CHOTINER and

RUSSELL E. PARSONS,

By MURRAY M. CHOTINER,

*Attorneys for Appellant, Wilshire  
Holding Corporation.*



No. 15973 ✓

---

**United States  
Court of Appeals**  
for the Ninth Circuit

---

MILDRED BECKER SCHULTZ,

Appellant,

vs.

JACK HOLMES, et al.,

Appellees.

---

**Transcript of Record**

---

**Appeal from the United States District Court for the  
Southern District of California  
Central Division**

**FILED**  
JUL 15 1958

PAUL P. O'BRIEN, CLERK





No. 15973

---

United States  
Court of Appeals  
for the Ninth Circuit

---

MILDRED BECKER SCHULTZ,  
Appellant,  
vs.  
JACK HOLMES, et al.,  
Appellees.

---

Transcript of Record

---

Appeal from the United States District Court for the  
Southern District of California  
Central Division



## INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

|  | PAGE |
|--|------|
| Answer of Broadcast Music, Inc., to First Amended Complaint .....  | 26   |
| Answer of Capitol Records, Inc., and Capitol Record Distributing Corp., to First Amended Complaint .....   | 13   |
| Answer of Columbia Records, Inc., to First Amended Complaint .....   | 48   |
| Answer of Decca Records, Inc., to First Amended Complaint .....  | 31   |
| Answer of Hill and Range Songs, Inc., and Rumbalero Music, Inc., to First Amended Complaint .....  | 20   |
| Answer of Carl Hoefle and Delmar Porter to First Amended Complaint .....   | 8    |
| Answer of Loew's Inc., Incorrectly Sued Herein as MGM Record Distributors and Served Herein as Defendant Doe I, to First Amended Complaint ..... | 37   |
| Answer of Radio Corp. of America to First Amended Complaint .....  | 42   |
| Attorneys, Names and Addresses of .....  | 1    |

| INDEX   | PAGE          |
|---|---------------|
| Certificate by Clerk .....  | 310           |
| Complaint, Amended .....  | 3             |
| Findings of Fact and Conclusions of Law .....                       | 54            |
| Judgment .....  | 61            |
| Notice of Appeal .....  | 64            |
| Statement of Points and Designation of Record,<br>Appellant's ..... | 313           |
| Transcript of Proceedings .....                                     | 65            |
| Opening Statement on Behalf of Certain<br>Defendants .....          | 69            |
| Opening Statement on Behalf of Plaintiff                            | 66            |
| Witnesses, Defendant's:   |               |
| Raksin, David   |               |
| —direct .....   | 204           |
| —cross .....  | 243           |
| —redirect .....   | 269, 271, 272 |
| —recross .....  | 270           |
| Schneider, George G.  |               |
| —direct .....   | 149, 162      |
| —cross .....  | 169           |
| —redirect .....   | 188, 191      |
| —recross .....  | 190, 193      |
| Schultz, Mildred Becker   |               |
| —direct .....   | 275           |
| —cross .....  | 298           |

**INDEX****PAGE****Witness, Plaintiff's:****Schultz, Mildred Becker**

|                     |          |
|---------------------|----------|
| —direct . . . . .   | 76       |
| —cross . . . . .    | 109, 117 |
| —redirect . . . . . | 133, 146 |
| —recross . . . . .  | 135      |









## NAMES AND ADDRESSES OF ATTORNEYS

### For Appellant:

THOMAS P. MAHONEY,  
4055 Wilshire Boulevard,  
Los Angeles 5, California;

CARL HOPPE,  
2610 Russ Building,  
San Francisco 4, California.

### For Appellees:

MANUEL RUIZ, JR.,  
704 So. Spring Street,  
Los Angeles 14, California,  
For Appellees Carl Hoeffle and D. S.  
Porter, etc.

MILTON A. RUDIN,  
PAYSON WOLFF,  
6400 Sunset Boulevard,  
Los Angeles 28, California,  
For Appellees and Appellants Hill  
and Range Songs, Inc., et al.



United States District Court for the Southern  
District of California, Central Division

Civil Action No. 17261C

(Transferred From Northern District of California,  
Northern Division, File No. 33536.)

MILDRED BECKER SCHULTZ,

Plaintiff,

vs.

JACK HOLMES; CHARLES DOUGLAS HONE;  
LINDLEY A. JONES, CARL HOEFLE and  
DELMAR S. PORTER, Copartners, Individually and as Copartners, Doing Business Under the Fictitious Firm Name and Style of  
TUNE TOWNE TUNES; HILL AND  
RANGE SONGS, INC., a Corporation;  
CAPITOL RECORDS, INC., a Corporation;  
CAPITOL RECORDS DISTRIBUTING  
CORPORATION, a Corporation; RUMBA-  
LERO MUSIC, INC., a Corporation; BMI  
BROADCAST MUSIC, INC., a Corporation;  
COLUMBIA RECORDS, INC., a Corporation;  
DECCA RECORDS, INC., a Corporation;  
RADIO CORPORATION OF AMERICA, a Corporation; MGM RECORD DISTRIBUTORS; DOE I, DOE II, DOE III, DOE IV, DOE V and DOE VI,

Defendants.

### AMENDED COMPLAINT

(Infringement of Copyright and  
Unfair Competition)

Comes now the plaintiff and for cause of action  
against the defendants and each of them alleges:

1. This action arises under the Act of July 30, 1947, 61 Stat. 652, as amended, United States Code, Title 17, as hereinafter more fully appears, and jurisdiction is founded upon Title 28, United States Code Sec. 1338 (a) and (b). [10\*]

2. Prior to April 7, 1941, plaintiff, who then was and ever since has been a citizen of the United States, created, wrote and composed an original musical composition entitled "Good Old Army," and prior to June 27, 1949, plaintiff created, wrote and composed a further version of said original music composition, which version was entitled "Waitin' For My Baby," which musical composition, under either or both names, is hereinafter for convenience called "the musical composition."

3. Plaintiff is ignorant of the true names and capacities of the defendants sued herein as Doe I, Doe II, Doe III, Doe IV, Doe V and Doe VI, and when said true names are discovered, plaintiff will ask leave of Court to amend this complaint to insert the true names of said defendants.

4. The musical composition contains a large amount of material wholly original with plaintiff and is copyrightable subject matter under the laws of the United States.

5. Plaintiff has heretofore complied in all respects with the Act of July 30, 1947, as amended, and all other laws governing copyright, and secured the exclusive rights and privileges in and to

---

\*Page numbering appearing at foot of page of original Certified Transcript of Record.

the copyright of the musical composition and received from the Register of Copyrights certificates of registration for the musical composition dated and identified as follows:

Title: "Good Old Army" (unpublished),

Class: E. Registration No. 172341.

Date: April 7, 1941.

Title: "Waitin' For My Baby" (unpublished),

Class: E. Registration No.: 254497.

Date: July 7, 1949.

6. Plaintiff did not, either before or after April 7, 1941, publish the musical composition, but plaintiff did disseminate the musical composition widely for purposes of consideration among musicians, arrangers, publishers and others in the musical industry, and plaintiff is informed and believes and, basing her allegation on that ground, alleges that defendants and each of [11] them received copies of the musical composition.

7. Since April 7, 1941, plaintiff has been and still is the sole proprietor of all rights, title and interest in and to said copyrights in the musical composition. After April 7, 1941, defendants infringed said copyright No. 254497, and after July 7, 1949, defendants infringed said copyright No. 172341, by publishing and placing on the market a musical composition hereinafter for convenience called "the infringing composition," sometimes entitled "Happy Pay Off Day," and sometimes entitled "The Blacksmith Blues," which infringing

composition was copied largely from the musical composition.

8. A copy of the musical composition in the original form entitled "Good Old Army" is attached hereto as Exhibit 1. A copy of the musical composition in the version entitled "Waitin' For My Baby" is attached hereto as Exhibit 2, and a copy of the infringing composition is attached hereto as Exhibit 3.

9. Plaintiff has notified defendants that defendants have infringed plaintiff's said copyrights, and defendants have nonetheless continued to infringe said copyrights.

10. Defendants and each of them unfairly used the results of plaintiff's labors and have incorporated such results in the infringing composition, and after April 7, 1941 and continuously since about 1950 defendants and each of them have been publishing, selling and otherwise marketing the infringing composition and have thereby been engaging in unfair trade practices and unfair competition against plaintiff, and plaintiff is informed and believes and on that ground alleges that defendants and each of them will continue to publish, sell and market the infringing composition in the same manner aforesaid—all to plaintiff's irreparable damage.

Wherefore, plaintiff demands:

1. That defendants and each of them, their agents and [12] servants be enjoined during the

pendency of this action and permanently from infringing said copyrights of plaintiff in any manner and from publishing, selling, marketing, or otherwise disposing of any copies of the musical composition entitled "Happy Pay Off Day" and "The Blacksmith Blues."

2. That defendants, and each of them, be required to pay to plaintiff such damages as plaintiff has sustained in consequence of defendants' infringement of said copyrights and said unfair trade practices and unfair competition, and to account for:

(a) All gains, profits and advantages derived by defendants, or any of them, by said unfair trade practices and unfair competition; and

(b) All gains, profits and advantages derived by defendants, or any of them, by their infringement of plaintiff's copyrights, or such damages as to the Court shall appear proper within the provisions of the copyright statutes, but in any event not less than the statutory minima.

3. That defendants, and each of them, be required to deliver up to be impounded during the pendency of this action all copies of said musical composition entitled "Happy Pay Off Day," also known as "The Blacksmith Blues," in their possession or under their control and to deliver up for destruction all infringing copies and all plates, molds or other matter for making such infringing copies.

4. That defendants, and each of them, pay to plaintiff the costs of this action and reasonable attorneys' fees to be allowed to the plaintiff by the Court.

5. That plaintiff have such other and further relief [13] as is just.

KENNETH N. CHANTRY and  
DAVID MELLINKOFF,

By /s/ DAVID MELLINKOFF,  
Attorneys for Plaintiff.

Trial by Jury Is Hereby Demanded.

[Endorsed]: Filed March 18, 1955. [14]

---

[Title of District Court and Cause.]

ANSWER OF CARL HOEFLE AND DELMAR  
PORTER TO FIRST AMENDED COMPLAINT

Comes Now, the defendant Carl Hoefle and Delmar S. Porter, individually, and as copartners, doing business under the fictitious firm name and style of Tune Towne Tunes, and by way of answer to the first amended complaint hereinabove, admit, deny and allege as follows:

I.

Deny generally and specifically each and every allegation contained in Paragraph 2 thereof, and as to the allegation therein that plaintiff is and has been a citizen of the United States by virtue of the



fact that defendants have no knowledge or information sufficient to form a belief thereon, base their denial of the truth of said allegation, upon information and belief.

II.

Deny generally and specifically each and every allegation contained in Paragraph 4 thereof.

III.

Have no information or knowledge sufficient to form a belief [19] as to the allegations contained in Paragraph 5, and basing their denial thereon, deny generally and specifically each and every allegation therein contained.

IV.

Have no knowledge or information sufficient to form a belief as to the allegations contained in Paragraphs 6 and 7, and basing their denial thereon, deny generally and specifically each and every allegation therein contained. Defendants further specifically deny that they or either of them have received any copies of plaintiff's musical compositions, and deny that the musical compositions entitled "Happy Pay Off Day" or "Blacksmith Blues" were copied whatsoever from plaintiff's copyrighted musical compositions.

V.

Refer to the allegations contained in Paragraph 8, and specifically deny that Exhibit III constitutes, or is an infringing composition, or that

the same infringes upon the musical compositions referred to therein as Exhibits I and II.

## VI.

Deny generally and specifically each and every allegation contained in Paragraphs 9 and 10 thereof, except that the defendants admit that they have caused to be published, sold, and marketed a musical composition entitled "Happy Pay Off Day" and "The Blacksmith Blues."

For a First Separate Defense, Said Defendants Allege:

### I.

That the complainant's alleged composition entitled "Good Old Army" and the version thereof known as "Waiting for My Baby," was neither new nor original with the complainant; that the alleged infringing portion, contains a beat, theme, and sequence of notes, and harmony, which has been used many times by others, prior to the time that complainant allegedly originated and composed the said alleged compositions or either of them, and that the basic melody, [20] beat, theme, and sequence of notes of complainant's alleged infringing portion was in the public domain, long prior to the time that the same was allegedly written and composed by the complainant.

By Way of Second Defense, Defendants Allege:

### I.

That there is no substantial similarity between the musical compositions set forth in Exhibits I,

II, and Exhibit III, nor does said Exhibit III contain a substantial or material portion of said Exhibits I and/or II.

## II.

That if there be any similarity of any unsubstantial or immaterial portion, the arrangement of the musical notes, are not only old, but have been used many times before. That there has been no original creation, by independent effort, by plaintiff of the alleged infringed portions of Exhibits I and II, in that the same has constituted the copying or imitation of the work of others.

## III.

That the complaint of plaintiff has been instituted without reasonable cause, and in bad faith, and has occasioned the need of these answering defendants to retain the services of Attorney Manuel Ruiz, Jr., to defend them legally, from said ill founded charges, so contained in plaintiff's petition.

By Way of Third Defense, Defendants Allege as Follows:

## I.

The claim set forth or attempted to be set forth in plaintiff's complaint, and each and every part thereof, is barred by the provisions of Section 339, subdivision (1) of the Code of Civil Procedure of the State of California.

By Way of Fourth Defense, Defendants Allege as Follows:

I.

Plaintiff has been guilty of laches with respect to asserting her claim in that the alleged infringing composition has for [21] a period of time both antecedent to, and since the statutory limitation period has been widely disseminated among musicians, arrangers, and publishers in the music industry, and otherwise, for good and valuable considerations exchanged and paid for in its commercial exploitation, in good faith, and it would now be manifestly unfair and contrary to equity, to require these answering defendants at this late date, to undo that which has been done in good faith and by reason thereof plaintiff should be denied any relief prayed for in plaintiff's said complaint on file herein.

Wherefore, the defendants demand judgment of dismissal, of the bill of complaint, for attorney's fees and a reasonable sum, for costs.

/s/ MANUEL RUIZ, JR.,  
Attorney for Defendants.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed April 11, 1955. [22]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS CAPITOL RECORDS, INC., AND CAPITOL RECORDS DISTRIBUTING CORP. TO FIRST AMENDED COMPLAINT

In answer to plaintiff's first amended complaint on file herein, defendants, Capitol Records, Inc., a corporation, and Capitol Records Distributing Corp., a corporation, for themselves alone, admit, deny and allege, as follows:

I.

Answering paragraphs 2, 5 and 6 of plaintiff's first [24] amended complaint, the answering defendants deny that they received copies of the musical compositions referred to in said paragraphs 2, 5 and 6. Except as herein expressly denied, these answering defendants are without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations contained in said paragraphs 2, 5 and 6 and, therefore, deny, generally and specifically, each and every allegation therein contained.

II.

Answering paragraph 4 of said complaint, the answering defendants deny, generally and specifically, each and every allegation therein contained.

III.

Answering paragraph 7 of said complaint, the answering defendants admit and allege as follows:

(1) Defendant Capitol Records, Inc., recorded and manufactured phonograph records of the performance of the musical composition "Happy Pay Off Day" by Mickey Katz, which phonograph record was distributed and sold by defendant Capitol Records Distributing Corp. Said recording, manufacture, distribution and sale was done pursuant to a license granted by defendant Tune Towne Tunes.

(2) Defendant Capitol Records, Inc., recorded and manufactured phonograph records of the performance of the musical composition "The Blacksmith Blues," by Ella Mae Morse, which phonograph record was first released on or about January 7, 1952. Said phonograph record was distributed and sold by defendant Capitol Records Distributing Corp. Said recording, manufacture, distribution and sale was done pursuant to a license granted by defendant Tune Towne Tunes.

(3) Defendant Capitol Records, Inc., recorded and manufactured phonograph records of the performance of the [25] musical composition "The Blacksmith Blues" by Eddie Bergman, which phonograph record was first released on or about December 1, 1952. Said record was distributed by defendant Capitol Records Distributing Corp. as part of its transcription service. Said recording, manufacture and distribution was done pursuant to a license granted by defendant Hill and Range Songs, Inc. These answering defendants expressly deny that by reason of the recording, manufacture, distribution and sale of said pho-

nograph records they thereby infringed plaintiff's alleged copyrights referred to in paragraph 5 of said amended complaint and further deny that the musical composition "The Blacksmith Blues" also known as "Happy Pay Off Day" was copied largely, or at all, from plaintiff's alleged copyright musical composition entitled "Good Old Army" or from the copyright further version thereof entitled "Waitin' for My Baby." Further answering said paragraph 7, these answering defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that, since April 7, 1941, plaintiff has been and still is the sole proprietor of all rights, title and interest in and to the alleged copyrights described in paragraph 5 of said complaint and, therefore, deny said allegation. Except as herein expressly admitted and alleged, and except as to the allegations herein denied for lack of information and belief, defendants deny, generally and specifically, each and every allegation contained in said paragraph 7.

#### IV.

Answering paragraph 8 of said complaint, these answering defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations that "Exhibit 1" or "Exhibit 2" attached to plaintiff's complaint are copies of plaintiff's alleged copyrighted musical composition. Further answering said paragraph 8, these answering [26] defendants admit that "Exhibit 3"

attached to plaintiff's complaint is a copy of the said musical composition, "The Blacksmith Blues," but deny that said musical composition infringes plaintiff's "Exhibit 1" or "Exhibit 2" or any other musical composition.

## V.

Answering paragraph 9 of said complaint, these answering defendants admit and allege that defendant Capitol Records, Inc., received a letter from an attorney, George White, Esq., dated November 17, 1952, claiming that the musical composition "The Blacksmith Blues" infringed a musical composition composed by his client, Mildred Schultz, which claim was denied on behalf of defendant Capitol Records, Inc. Except as hereinabove expressly admitted and alleged, defendants deny, generally and specifically, each and every allegation contained in said paragraph 9.

## VI.

Answering paragraph 10 of plaintiff's complaint, these answering defendants admit and allege that the phonograph record of the performance of "The Blacksmith Blues," by Ella Mae Morse is still being manufactured by defendant Capitol Records, Inc., and distributed and sold by defendant Capitol Records Distributing Corp. Except as herein expressly admitted and alleged, defendants deny, generally and specifically, each and every allegation contained in said paragraph 10.



For a First Affirmative Defense, These Answering Defendants Allege:

VII.

Plaintiff's first amended complaint fails to state a claim against these answering defendants upon which relief can be granted. [27]

For a Second Affirmative Defense, These Answering Defendants Allege:

VIII.

Plaintiff's first amended complaint fails to state a claim against these answering defendants within the jurisdiction of the United States District Courts.

For a Third Affirmative Defense, These Answering Defendants Allege:

IX.

The claim set forth or attempted to be set forth in plaintiff's first amended complaint, and each and every part thereof, is barred by the provisions of Section 339, subdivision (1) of the Code of Civil Procedure of the State of California.

For a Fourth Affirmative Defense, These Answering Defendants Allege:

X.

Plaintiff has been guilty of laches with respect to asserting her alleged claim set forth in plaintiff's

first amended complaint and with respect to commencing this action and by reason thereof should be denied any relief prayed for in plaintiff's said complaint on file herein.

For a Fifth Affirmative Defense, These Answering Defendants Allege:

XI.

That there is no substantial similarity between the musical compositions set forth in "Exhibit 3" and the musical compositions set forth in "Exhibit 1" or "Exhibit 2," nor does said "Exhibit 3" contain a substantial or material portion of said "Exhibit 1" or "Exhibit 2." [28]

XII.

Insofar as any musical material in said composition "The Blacksmith Blues" or "Happy Pay Off Day" may have or bear any point of resemblance to plaintiff's musical composition "Good Old Army" or "Waitin' for My Baby," such musical material is in the public domain and was not copied or prepared from plaintiff's alleged musical composition.

For a Sixth Affirmative Defense, These Answering Defendants Allege:

XIII.

That the musical material contained in plaintiff's alleged musical compositions "Good Old Army" or "Waitin' for My Baby" has for many years been

and now is in the public domain, and is not subject to copyright registration or to exclusive appropriation of any person or persons whatsoever, and that plaintiff has not and cannot have any exclusive right or property right whatsoever, or exclusive title or interest in the same, or any part thereof.

For a Seventh Affirmative Defense, These Answering Defendants Allege:

XIV.

By reason of the matters and things set forth in paragraph XIII hereinabove, plaintiff's alleged copyrights, referred to in paragraph 5 of plaintiff's first amended complaint, are void.

For an Eighth Affirmative Defense, These Answering Defendants Allege:

XV.

That the commencement of the within action by plaintiff [29] has occasioned the need of the retention of the services of Manuel Ruiz, Jr., as an attorney to defend the within action on behalf of these answering defendants.

Wherefore, these answering defendants pray judgment that plaintiff take nothing by her first amended complaint and that the same be dismissed, that these answering defendants have and recover of plaintiff their attorney's fees in a reasonable sum and costs incurred herein, and for such other

and further relief as to the Court may seem proper and equitable in the premises.

/s/ MANUEL RUIZ, JR.,  
Attorney for Defendants Capitol Records, Inc., and  
Capitol Records Distributing Corp.

Duly verified.

[Endorsed]: Filed April 13, 1955. [30]

---

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS HILL AND  
RANGE SONGS, INC., AND RUMBALERO  
MUSIC, INC., TO FIRST AMENDED COM-  
PLAINT

In answer to plaintiff's first amended complaint on file herein, defendants, Hill and Range Songs, Inc., a corporation, and Rumbalero Music, Inc., a corporation, for themselves alone, admit, deny and allege, as follows:

I.

Answering paragraphs 2, 4, 5 and 6 of [32] plaintiff's first amended complaint, the answering defendants deny that they received copies of the musical compositions referred to in said paragraphs 2, 4, 5 and 6. Except as herein expressly denied, these answering defendants are without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations contained in said paragraphs 2, 4, 5 and 6 and, therefore, deny, gen-

erally and specifically, each and every allegation therein contained.

## II.

Answering paragraph 7 of said complaint, these answering defendants admit and allege that subsequent to April 7, 1941, defendant Hill and Range Songs, Inc., published and marketed the musical composition "The Blacksmith Blues" previously known as "Happy Pay Off Day" and that defendant Rumbalero Music, Inc., licensed public performances for profit of said musical composition, but deny that they thereby infringed plaintiff's alleged copyrights referred to in paragraph 5 of said complaint and further deny that the musical composition "The Blacksmith Blues" also known as "Happy Pay Off Day" was copied largely, or at all, from plaintiff's alleged copyright musical composition, entitled "Good Old Army" or from the copyright further version thereof entitled "Waitin For My Baby." Further answering said paragraph 7, these answering defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that, since April 7, 1941, plaintiff has been and still is the sole proprietor of all rights, title and interest in and to the copyrights described in paragraph 5 of said complaint and, therefore, deny said allegation. Except as herein expressly admitted and alleged, and except as to the allegations herein denied for lack of information and belief, defendants deny, generally and specifically, each and every allegation contained in said paragraph [33] 7.

## III.

Answering paragraph 8 of said complaint, these answering defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations that "Exhibit 1" or "Exhibit 2" attached to plaintiff's complaint are copies of plaintiff's alleged copyrighted musical composition. Further answering said paragraph 8, these answering defendants admit that "Exhibit 3" attached to plaintiff's complaint is a copy of the said musical composition, "The Blacksmith Blues" published, marketed and licensed by these answering defendants as admitted and alleged in paragraph II hereinabove, but deny that said musical composition infringes Plaintiff's "Exhibit 1" or "Exhibit 2" or any other musical composition.

## IV.

Answering paragraph 9 of plaintiff's complaint, these answering defendants admit and allege that in 1952 they commenced receiving correspondence from George B. White, representing himself as plaintiff's attorney, asserting certain claims of infringement on behalf of plaintiff, which claims defendant's attorneys denied. Except as hereinabove expressly admitted and alleged, defendants deny, generally and specifically, each and every allegation contained in said paragraph 9.

## V.

Answering paragraph 10 of plaintiff's complaint, these answering defendants admit and allege that since on or about January, 1952, defendant Hill and

Range Songs, Inc., has published, sold and otherwise marketed, and defendant Rumbalero Music, Inc., has licensed the public performance for profit of said musical composition "The Blacksmith Blues." Except as herein expressly admitted and alleged, defendants deny, [34] generally and specifically, each and every allegation contained in said paragraph 10.

For a First Affirmative Defense, These Answering Defendants Allege:

VI.

Plaintiff's first amended complaint fails to state a claim against these answering defendants upon which relief can be granted.

For a Second Affirmative Defense, These Answering Defendants Allege:

VII.

Plaintiff's first amended complaint fails to state a claim against these answering defendants within the jurisdiction of the United States District Courts.

For a Third Affirmative Defense, These Answering Defendants Allege:

VIII.

The claim set forth or attempted to be set forth in plaintiff's first amended complaint, and each and every part thereof, is barred by the provisions of Section 339, subdivision (1) of the Code of Civil Procedure of the State of California, or by Section 340, subdivision (3) of the Code of Civil Procedure of the State of California.

For a Fourth Affirmative Defense, These Answering Defendants Allege:

IX.

Plaintiff has been guilty of laches with respect to asserting her alleged claim set forth in plaintiff's first [35] amended complaint and with respect to commencing this action and by reason thereof should be denied any relief prayed for in plaintiff's said complaint on file herein.

For a Fifth Affirmative Defense, These Answering Defendants Allege:

X.

Insofar as any musical material in said composition "The Blacksmith Blues" may have or bear any point of resemblance to plaintiff's musical composition "Good Old Army" or "Waitin For My Baby," such musical material is in the public domain and was not copied or prepared from plaintiff's alleged musical composition.

For a Sixth Affirmative Defense, These Answering Defendants Allege:

XI.

That the musical material contained in plaintiff's alleged musical compositions "Good Old Army" or "Waitin For My Baby" has for many years been and now is in the public domain, and is not subject to copyright registration or to exclusive appropriation of any person or persons whatsoever, and that plaintiff has not and cannot have exclusive right or



property right whatsoever, or exclusive title or interest in the same, or any part thereof.

For a Seventh Affirmative Defense, These Answering Defendants Allege:

XII.

By reason of the matters and things set forth in paragraph XI hereinabove, plaintiff's alleged copyrights, referred to in paragraph 5 of plaintiff's first amended [36] complaint, are void.

Wherefore, these answering defendants pray judgment that plaintiff take nothing by her complaint and that these answering defendants have and recover of plaintiff their attorney's fees and costs incurred herein, and for such other and further relief as to the Court may seem proper and equitable in the premises.

GANG, KOPP & TYRE,

By /s/ MILTON A. RUDIN,  
Attorneys for Defendants Hill and Range Songs,  
Inc., and Rumbalero Music, Inc.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed April 21, 1955. [37]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT BROADCAST  
MUSIC, INC., TO FIRST AMENDED COM-  
PLAINT

In answer to plaintiff's first amended complaint on file herein, defendant, Broadcast Music, Inc., a corporation, incorrectly sued herein as BMI Broadcast Music, Inc., for itself alone, admits, denies and alleges, as follows: [39]

I.

Answering paragraphs 2, 4, 5 and 6 of plaintiff's first amended complaint, this answering defendant denies that it received copies of the musical compositions referred to in said paragraphs 2, 4, 5 and 6. Except as herein expressly denied, this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations contained in said paragraphs 2, 4, 5 and 6 and, therefore, denies, generally and specifically, each and every allegation, therein contained.

II.

Answering paragraph 7 of said complaint, the answering defendant admits and alleges that, subsequent to April 7, 1941, defendant Broadcast Music, Inc., licensed the public performance for profit of the musical composition "The Blacksmith Blues," previously known as "Happy Pay Off Day." Said licenses were granted pursuant to an agreement with and authority from defendant Hill and Range

Songs, Inc. This answering defendant expressly denies that by reason of granting said licenses it thereby infringed plaintiff's alleged copyrights referred to in paragraph 5 of said complaint, and further denies that the musical composition "The Blacksmith Blues," also known as "Happy Pay Off Day," was copied largely, or at all, from plaintiff's alleged copyright musical composition entitled "Good Old Army" or from the copyright further version thereof entitled "Waitin For My Baby." Further answering said paragraph 7, this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that, since April 7, 1941, plaintiff has been and still is the sole proprietor of all rights, title and interest in and to the copyrights described in paragraph 5 of said complaint and, [40] therefore, denies said allegation. Except as herein expressly admitted and alleged, and except as to the allegations herein denied for lack of information and belief, defendant denies, generally and specifically, each and every allegation contained in said paragraph 7.

### III.

Answering paragraph 8 of said complaint, this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations that "Exhibit 1" or "Exhibit 2" attached to plaintiff's complaint are copies of plaintiff's alleged copyrighted musical composition. Further answering said paragraph 8, this answering defendant admits that "Exhibit 3" attached to plaintiff's com-

plaint is a copy of the said musical composition, "The Blacksmith Blues," but denies that said musical composition infringes Plaintiff's "Exhibit 1" or "Exhibit 2" or any other musical composition.

#### IV.

Answering paragraph 9 of said complaint, this answering defendant denies, generally and specifically, each and every allegation contained in said paragraph 9.

#### V.

Answering paragraph 10 of plaintiff's complaint, this answering defendant admits and alleges that it is still licensing the public performance for profit of the said musical composition "The Blacksmith Blues." Except as herein expressly admitted and alleged, this answering defendant denies, generally and specifically, each and every allegation contained in said paragraph 10.

For a First Affirmative Defense, This Answering Defendant Alleges: [41]

#### VI.

Plaintiff's first amended complaint fails to state a claim against this answering defendant upon which relief can be granted.

For a Second Affirmative Defense, This Answering Defendant Alleges:

#### VII.

Plaintiff's first amended complaint fails to state

a claim against this answering defendant within the jurisdiction of the United States District Courts.

For a Third Affirmative Defense, This Answering Defendant Alleges:

VIII.

The claim set forth or attempted to be set forth in plaintiff's first amended complaint, and each and every part thereof, is barred by the provisions of Section 339, subdivision (1) of the Code of Civil Procedure of the State of California, or by Section 340, subdivision (3) of the Code of Civil Procedure of the State of California.

For a Fourth Affirmative Defense, This Answering Defendant Alleges:

IX.

Plaintiff has been guilty of laches with respect to asserting her alleged claim set forth in plaintiff's first amended complaint and with respect to commencing this action and by reason thereof should be denied any relief prayed for in plaintiff's said complaint on file herein.

For a Fifth Affirmative Defense, This Answering Defendant [42] Alleges:

X.

Insofar as any musical material in said composition "The Blacksmith Blues" may have or bear any point of resemblance to plaintiff's musical composi-

tion "Good Old Army" or "Waitin For My Baby," such musical material is in the public domain and was not copied or prepared from plaintiff's alleged musical composition.

For a Sixth Affirmative Defense, This Answering Defendant Alleges:

### XI.

That the musical material contained in plaintiff's alleged musical compositions "Good Old Army" or "Waitin For My Baby" has for many years been and now is in the public domain, and is not subject to copyright registration or to exclusive appropriation of any person or persons whatsoever, and that plaintiff has not and cannot have exclusive right or property right whatsoever, or exclusive title or interest in the same, or any part thereof.

For a Seventh Affirmative Defense, This Answering Defendant Alleges:

### XII.

By reason of the matters and things set forth in paragraph XI hereinabove, plaintiff's alleged copyrights, referred to in paragraph 5 of plaintiff's first amended complaint, are void.

Wherefore, this answering defendant prays judgment that plaintiff take nothing by her complaint and that this answering defendant have and recover of plaintiff its [43] attorney's fees and costs incurred herein, and for such other and further relief

as to the Court may seem proper and equitable in the premises.

GANG, KOPP & TYRE,

By /s/ MILTON A. RUDIN,

Attorneys for Defendant

Broadcast Music, Inc.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed May 16, 1955. [44]

---

[Title of District Court and Cause.]

ANSWER OF DEFENDANT DECCA RECORDS, INC., TO FIRST AMENDED COMPLAINT

In answer to plaintiff's first amended complaint on file herein, defendant, Decca Records, Inc., a corporation, for itself alone, admits, denies and alleges, as follows:

I.

Answering paragraphs 2, 4, 5 and 6 of plaintiff's first amended complaint, this answering defendant denies [47] that it received copies of the musical compositions referred to in said paragraphs 2, 4, 5 and 6. Except as herein expressly denied, this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations contained in said paragraphs 2, 4, 5 and 6 and, therefore, denies, generally and specifically, each and every allegation therein contained.

## II.

Answering paragraph 7 of said complaint, this answering defendant admits and alleges as follows:

1. Defendant Decca Records, Inc., recorded, manufactured, distributed and sold phonograph records of the performance of the musical composition "The Blacksmith Blues" by Sy Oliver, which phonograph recording was first released on or about February, 1952.

2. Defendant Decca Records, Inc., recorded, manufactured, distributed and sold phonograph records of the performance of the musical composition "The Blacksmith Blues" by Bill Barnell, which phonograph recording was first released on or about February, 1952.

Said recording, manufacture, distribution and sale was done pursuant to a license granted by defendant Hill and Range Songs, Inc. This answering defendant expressly denies that by reason of the recording, manufacture, distribution and sale of said phonograph records, it thereby infringed plaintiff's alleged copyrights referred to in paragraph 5 of said complaint, and further denies that the musical composition "The Blacksmith Blues" also known as "Happy Pay Off Day" was copied largely, or at all, from plaintiff's alleged copyright musical composition, entitled "Good Old Army" or from [48] the copyright further version thereof entitled "Waitin For My Baby." Further answering said paragraph 7, this answering defendant is without knowledge or information sufficient to form a belief as to the truth



of the allegation that, since April 7, 1941, plaintiff has been and still is the sole proprietor of all rights, title and interest in and to the copyrights described in paragraph 5 of said complaint and, therefore, denies said allegation. Except as herein expressly admitted and alleged, and except as to the allegations herein denied for lack of information and belief, defendant denies, generally and specifically, each and every allegation contained in said paragraph 7.

### III.

Answering paragraph 8 of said complaint, this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations that "Exhibit 1" or "Exhibit 2" attached to plaintiff's complaint are copies of plaintiff's alleged copyrighted musical composition. Further answering said paragraph 8, this answering defendant admits that "Exhibit 3" attached to plaintiff's complaint is a copy of the said musical composition, "The Blacksmith Blues," but denies that said musical composition infringes plaintiff's "Exhibit 1" or "Exhibit 2" or any other musical composition.

### IV.

Answering paragraph 9 of said complaint, this answering defendant denies, generally and specifically, each and every allegation contained in said paragraph 9.

### V.

Answering paragraph 10 of plaintiff's complaint, this answering defendant admits and alleges that

the phonograph recording of the performance of "The Blacksmith Blues" [49] by Sy Oliver, and the phonograph recording of the performance of "The Blacksmith Blues" by Bill Barnell are still being manufactured, distributed and sold by Decca Records, Inc. Except as herein expressly admitted and alleged, this answering defendant denies, generally and specifically, each and every allegation contained in said paragraph 10.

For a First Affirmative Defense, This Answering Defendant Alleges:

#### VI.

Plaintiff's first amended complaint fails to state a claim against this answering defendant upon which relief can be granted.

For a Second Affirmative Defense, This Answering Defendant Alleges:

#### VII.

Plaintiff's first amended complaint fails to state a claim against this answering defendant within the jurisdiction of the United States District Courts.

For a Third Affirmative Defense, This Answering Defendant Alleges:

#### VIII.

The claim set forth or attempted to be set forth in plaintiff's first amended complaint, and each and every part thereof, is barred by the provisions

of Section 339, subdivision (1) of the Code of Civil Procedure of the State of California, or by Section 340, subdivision (3) of the Code of Civil Procedure of the State of California.

For a Fourth Affirmative Defense, This Answering Defendant [50] Alleges:

IX.

Plaintiff has been guilty of laches with respect to asserting her alleged claim set forth in plaintiff's first amended complaint and with respect to commencing this action and by reason thereof should be denied any relief prayed for in plaintiff's said complaint on file herein.

For a Fifth Affirmative Defense, This Answering Defendant Alleges:

X.

Insofar as any musical material in said composition "The Blacksmith Blues" may have or bear any point of resemblance to plaintiff's musical composition "Good Old Army" or "Waitin For My Baby," such musical material is in the public domain and was not copied or prepared from plaintiff's alleged musical composition.

For a Sixth Affirmative Defense, This Answering Defendant Alleges:

XI.

That the musical material contained in plaintiff's alleged musical compositions "Good Old Army" or

“Waitin For My Baby” has for many years been and now is in the public domain, and is not subject to copyright registration or to exclusive appropriation of any person or persons whatsoever, and that plaintiff has not and cannot have exclusive right or property right whatsoever, or exclusive title or interest in the same, or any part thereof.

For a Seventh Affirmative Defense, This Answering Defendant Alleges: [51]

## XII.

By reason of the matters and things set forth in paragraph XI hereinabove, plaintiff’s alleged copyrights, referred to in paragraph 5 of plaintiff’s first amended complaint, are void.

Wherefore, this answering defendant prays judgment that plaintiff take nothing by her complaint and that this answering defendant have and recover of plaintiff its attorney’s fees and costs incurred herein, and for such other and further relief as to the Court may seem proper and equitable in the premises.

GANG, KOPP & TYRE,

By /s/ MILTON A. RUDIN,

Attorneys for Defendant,  
Decca Records, Inc.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed May 17, 1955. [52]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT LOEW'S INCORPORATED, INCORRECTLY SUED HEREIN AS MGM RECORD DISTRIBUTORS AND SERVED HEREIN AS DEFENDANT DOE I, TO FIRST AMENDED COMPLAINT

In answer to plaintiff's first amended complaint on file herein, defendant, Loew's Incorporated, a corporation, incorrectly sued herein as MGM Record Distributors and served herein as defendant "Doe I," for itself alone, admits, denies and alleges, as follows: [55]

I.

Answering paragraphs 2, 4, 5 and 6 of plaintiff's first amended complaint, this answering defendant denies that it received copies of the musical compositions referred to in said paragraphs 2, 4, 5 and 6. Except as herein expressly denied, this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations contained in said paragraphs 2, 4, 5 and 6 and, therefore, denies, generally and specifically, each and every allegation therein contained.

II.

Answering paragraph 7 of said complaint, the answering defendant admits and alleges that it recorded, manufactured, distributed and sold phonograph records of the performance of the musical composition "The Blacksmith Blues" by Art Moo-

ney, which phonograph recording was first released on or about January, 1952. Said recording, manufacture, distribution and sale was done pursuant to a license granted by defendant Hill and Range Songs, Inc. This answering defendant expressly denies that by reason of the recording, manufacture, distribution and sale of said phonograph records, it thereby infringed plaintiff's alleged copyrights referred to in paragraph 5 of said complaint and further denies that the musical composition "The Blacksmith Blues," also known as "Happy Pay Off Day," was copied largely, or at all, from plaintiff's alleged copyright musical composition entitled "Good Old Army" or from the copyright further version thereof entitled "Waitin For My Baby." Further answering said paragraph 7, this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that, since April 7, 1941, plaintiff has been and still is the sole proprietor of all rights, title and interest in and [56] to the copyrights described in paragraph 5 of said complaint and, therefore, denies said allegation. Except as herein expressly admitted and alleged, and except as to the allegations herein denied for lack of information and belief, defendant denies, generally and specifically, each and every allegation contained in said paragraph 7.

### III.

Answering paragraph 8 of said complaint, this answering defendant is without knowledge or information sufficient to form a belief as to the truth

of the allegations that "Exhibit 1" or "Exhibit 2" attached to plaintiff's complaint are copies of plaintiff's alleged copyrighted musical composition. Further answering said paragraph 8, this answering defendant admits that "Exhibit 3" attached to plaintiff's complaint is a copy of the said musical composition, "The Blacksmith Blues," but denies that said musical composition infringes plaintiff's "Exhibit 1" or "Exhibit 2" or any other musical composition.

#### IV.

Answering paragraph 9 of said complaint, this answering defendant denies, generally and specifically, each and every allegation contained in said paragraph 9.

#### V.

Answering paragraph 10 of plaintiff's complaint, this answering defendant admits and alleges that the phonograph recording of the performance of "The Blacksmith Blues" by Art Mooney is still being manufactured, distributed and sold by Loew's Incorporated. Except as herein expressly admitted and alleged, this answering defendant denies, generally and specifically, each and every allegation contained in said paragraph 10. [57]

For a First Affirmative Defense, This Answering Defendant Alleges:

#### VI.

Plaintiff's first amended complaint fails to state a claim against this answering defendant upon which relief can be granted.

For a Second Affirmative Defense, This Answering Defendant Alleges:

VII.

Plaintiff's first amended complaint fails to state a claim against this answering defendant within the jurisdiction of the United States District Courts.

For a Third Affirmative Defense, This Answering Defendant Alleges:

VIII.

The claim set forth or attempted to be set forth in plaintiff's first amended complaint, and each and every part thereof, is barred by the provisions of Section 339, subdivision (1) of the Code of Civil Procedure of the State of California, or by Section 340, subdivision (3) of the Code of Civil Procedure of the State of California.

For a Fourth Affirmative Defense, This Answering Defendant Alleges:

IX.

Plaintiff has been guilty of laches with respect to asserting her alleged claim set forth in plaintiff's first amended complaint and with respect to commencing this action and by reason thereof should be denied any relief prayed for in plaintiff's said complaint on file herein. [58]



For a Fifth Affirmative Defense, This Answering Defendant Alleges:

X.

Insofar as any musical material in said composition "The Blacksmith Blues" may have or bear any point of resemblance to plaintiff's musical composition "Good Old Army" or "Waitin For My Baby," such musical material is in the public domain and was not copied or prepared from plaintiff's alleged musical composition.

For a Sixth Affirmative Defense, This Answering Defendant Alleges:

XI.

That the musical material contained in plaintiff's alleged musical compositions "Good Old Army" or "Waitin For My Baby" has for many years been and now is in the public domain, and is not subject to copyright registration or to exclusive appropriation of any person or persons whatsoever, and that plaintiff has not and cannot have exclusive right or property right whatsoever, or exclusive title or interest in the same, or any part thereof.

For a Seventh Affirmative Defense, This Answering Defendant Alleges:

XII.

By reason of the matters and things set forth in paragraph XI hereinabove, plaintiff's alleged copyrights, referred to in paragraph 5 of plaintiff's first amended complaint, are void.

Wherefore, this answering defendant prays judgment that plaintiff take nothing by her complaint and that this [59] answering defendant have and recover of plaintiff its attorney's fees and costs incurred herein, and for such other and further relief as to the Court may seem proper and equitable in the premises.

GANG, KOPP & TYRE,

By /s/ MILTON A. RUDIN,

Attorneys for Defendant,  
Loew's Incorporated.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed May 19, 1955.

---

[Title of District Court and Cause.]

ANSWER OF DEFENDANT RADIO CORPORATION OF AMERICA TO FIRST AMENDED COMPLAINT

In answer to plaintiff's first amended complaint on file herein, defendant, Radio Corporation of America, a corporation, for itself alone, admits, denies and alleges, as follows:

I.

Answering paragraphs 2, 4, 5 and 6 of said complaint, [62] this answering defendant alleges that it has no record of receiving copies of the musical

compositions referred to in said paragraphs 2, 4, 5 and 6. Except as herein expressly alleged, this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations contained in said paragraphs 2, 4, 5 and 6 and, therefore, denies, generally and specifically, each and every allegation therein contained.

## II.

Answering paragraph 7 of said complaint, this answering defendant admits and alleges as follows:

1. Defendant Radio Corporation of America recorded, manufactured, distributed and sold phonograph records of the performance of the musical composition "The Blacksmith Blues" by Elton Britt, which phonograph recording was first released on or about February, 1952.

2. Defendant Radio Corporation of America recorded, manufactured, distributed and sold phonograph records of the performance of the musical composition "The Blacksmith Blues" by Ralph Flanagan, which phonograph recording was first released on or about May, 1952.

Said recording, manufacture, distribution and sale was done pursuant to a license granted by defendant Hill and Range Songs, Inc. This answering defendant expressly denies that by reason of the recording, manufacture, distribution and sale of said phonograph records, it thereby infringed plaintiff's alleged copyrights referred to in paragraph 5 of said complaint, and further denies that the

musical composition "The Blacksmith Blues" also known as "Happy Pay Off Day" was copied largely, or at all, from plaintiff's alleged [63] copyright musical composition, entitled "Good Old Army" or from the copyright further version thereof entitled "Waitin For My Baby." Further answering said paragraph 7, this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that, since April 7, 1941, plaintiff has been and still is the sole proprietor of all rights, title and interest in and to the copyrights described in paragraph 5 of said complaint and, therefore, denies said allegation. Except as herein expressly admitted and alleged, and except as to the allegations herein denied for lack of information and belief, defendant denies, generally and specifically, each and every allegation contained in said paragraph 7.

### III.

Answering paragraph 8 of said complaint, this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations that "Exhibit 1" or "Exhibit 2" attached to plaintiff's complaint are copies of plaintiff's alleged copyrighted musical composition. Further answering said paragraph 8, this answering defendant admits that "Exhibit 3" attached to plaintiff's complaint is a copy of the said musical composition "The Blacksmith Blues," but denies that said musical composition infringes plaintiff's

“Exhibit 1” or “Exhibit 2” or any other musical composition.

IV.

Answering paragraph 9 of said complaint, this answering defendant denies, generally and specifically, each and every allegation contained in said paragraph 9.

V.

Answering paragraph 10 of plaintiff's complaint, this answering defendant admits and alleges that the phonograph [64] recording of the performance of “The Blacksmith Blues” by Ralph Flanagan, and the phonograph recording of the performance of “The Blacksmith Blues” by Elton Britt are still being manufactured, distributed and sold by Radio Corporation of America. Except as herein expressly admitted and alleged, this answering defendant denies, generally and specifically, each and every allegation contained in said paragraph 10.

For a First Affirmative Defense, This Answering Defendant Alleges:

VI.

Plaintiff's first amended complaint fails to state a claim against this answering defendant upon which relief can be granted.

For a Second Affirmative Defense, This Answering Defendant Alleges:

VII.

Plaintiff's first amended complaint fails to state a claim against this answering defendant within

the jurisdiction of the United States District Courts.

For a Third Affirmative Defense, This Answering Defendant Alleges:

### VIII.

The claim set forth or attempted to be set forth in plaintiff's first amended complaint, and each and every part thereof, is barred by the provisions of Section 339, subdivision (1) of the Code of Civil Procedure of the State of California, or by Section 340, subdivision (3) of the Code of Civil Procedure of the State of California. [65]

For a Fourth Affirmative Defense, This Answering Defendant Alleges:

### IX.

Plaintiff has been guilty of laches with respect to asserting her alleged claim set forth in plaintiff's first amended complaint and with respect to commencing this action and by reason thereof should be denied any relief prayed for in plaintiff's said complaint on file herein.

For a Fifth Affirmative Defense, This Answering Defendant Alleges:

### X.

Insofar as any musical material in said composition "The Blacksmith Blues" may have or bear any point of resemblance to plaintiff's musical com-

position "Good Old Army" or "Waitin For My Baby," such musical material is in the public domain and was not copied or prepared from plaintiff's alleged musical composition.

For a Sixth Affirmative Defense, This Answering Defendant Alleges:

XI.

That the musical material contained in plaintiff's alleged musical compositions "Good Old Army" or "Waitin For My Baby" has for many years been and now is in the public domain, and is not subject to copyright registration or to exclusive appropriation of any person or persons whatsoever, and that plaintiff has not and cannot have exclusive right or property right whatsoever, or exclusive title or interest in the same, or any part thereof.

For a Seventh Affirmative Defense, This Answering Defendant Alleges:

XII.

By reason of the matters and things set forth in paragraph XI hereinabove, plaintiff's alleged copyrights, referred to in paragraph 5 of plaintiff's first amended complaint, are void.

Wherefore, this answering defendant prays judgment that plaintiff take nothing by her complaint and that this answering defendant have and recover of plaintiff its attorney's fees and costs incurred herein, and for such other and further relief as to

the Court may seem proper and equitable in the premises.

GANG, KOPP & TYRE,

By /s/ MILTON A. RUDIN,

Attorneys for Defendant Radio  
Corporation of America.

Duly Verified.

Affidavit of servie by mail attached.

[Endorsed]: Filed May 24, 1955. [67]

---

[Title of District Court and Cause.]

ANSWER OF DEFENDANT COLUMBIA RECORDS, INC., TO FIRST AMENDED COMPLAINT

In answer to plaintiff's first amended complaint on file herein, defendant, Columbia Records, Inc., a corporation, for itself alone, admits, denies and alleges, as follows:

I.

Answering paragraphs 2, 4, 5 and 6 of said complaint, this answering defendant alleges that it has no record of receiving copies of the musical compositions referred to in said paragraphs 2, 4, 5 and 6. Except as herein expressly alleged, this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations contained in said paragraphs 2,



4, 5 and 6 and, therefore, denies, generally and specifically, each and every allegation therein contained.

## II.

Answering paragraph 7 of said complaint, the answering defendant admits and alleges as follows:

1. Defendant Columbia Records, Inc., recorded, manufactured, distributed and sold phonograph records of the performance of the musical composition "The Blacksmith Blues" by Harry James and Tony Harper, which phonograph recording was first released on or about February, 1952.

2. Defendant Columbia Records, Inc., recorded, manufactured, distributed and sold phonograph records of the performance of the musical composition "The Blacksmith Blues" by Leon McAuliffe, which phonograph recording was first released on or about February, 1952.

Said recording, manufacture, distribution and sale was done pursuant to licenses granted by defendant Hill and Range Songs, Inc. This answering defendant expressly denies that by reason of the recording, manufacture, distribution and sale of said phonograph records, it thereby infringed plaintiff's alleged copyrights referred to in paragraph 5 of said complaint and further denies that the musical composition "The Blacksmith Blues" also known as "Happy Pay Off Day" was copied largely, or at all, from plaintiff's alleged copyright musical composition, entitled, "Good Old Army" or from the copyright further version thereof entitled "Waitin For

My Baby.” Further answering said paragraph 7, this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that, since April 7, 1941, plaintiff has been and still is the sole proprietor of all rights, title and interest in and to the copyrights described in paragraph 5 of said complaint and, therefore, denies said allegation. Except as herein expressly admitted and alleged, and except as to the allegations herein denied for lack of information and belief, defendant denies, generally and specifically, each and every allegation contained in said paragraph 7.

### III.

Answering paragraph 8 of said complaint, this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations that “Exhibit 1” or “Exhibit 2” attached to plaintiff’s complaint are copies of plaintiff’s alleged copyrighted musical composition. Further answering said paragraph 8, this answering defendant admits that “Exhibit 3” attached to plaintiff’s complaint is a copy of the said musical composition, “The Blacksmith Blues,” but denies that said musical composition infringes plaintiff’s “Exhibit 1” or “Exhibit 2” or any other musical composition.

### IV.

Answering paragraph 9 of said complaint, this answering defendant denies, generally and specifically, each and every allegation contained in said paragraph 9.

V.

Answering paragraph 10 of said complaint, this answering defendant admits and alleges that, on or about June, 1953, it discontinued the manufacture, distribution and sale of the phonograph recording of the performance of "The Blacksmith Blues" by Harry James and Tony Harper; that, on or about April, 1954, it discontinued the manufacture, distribution and sale of the phonograph recording of the performance of "The Blacksmith Blues" by Leon McAuliffe.

For a First Affirmative Defense, This Answering Defendant Alleges:

VI

Plaintiff's first amended complaint fails to state a claim against this answering defendant upon which relief can be granted.

For a Second Affirmative Defense, This Answering Defendant Alleges:

VII

Plaintiff's first amended complaint fails to state a claim against this answering defendant within the jurisdiction of the United States District Courts.

For a Third Affirmative Defense, This Answering Defendant Alleges:

VIII

The claim set forth or attempted to be set forth in plaintiff's first amended complaint, and each and

every part thereof, is barred by the provisions of Section 339, subdivision (1) of the Code of Civil Procedure of the State of California, or by Section 340, subdivision (3) of the Code of Civil Procedure of the State of California.

For a Fourth Affirmative Defense, This Answering Defendant [73] Alleges:

IX.

Plaintiff has been guilty of laches with respect to asserting her alleged claim set forth in plaintiff's first amended complaint and with respect to commencing this action and by reason thereof should be denied any relief prayed for in plaintiff's said complaint on file herein.

For a Fifth Affirmative Defense, This Answering Defendant Alleges:

X.

Insofar as any musical material in said composition "The Blacksmith Blues" may have or bear any point of resemblance to plaintiff's musical composition "Good Old Army" or "Waitin For My Baby," such musical material is in the public domain and was not copied or prepared from plaintiff's alleged musical composition.

For a Sixth Affirmative Defense, This Answering Defendant Alleges:

XI.

That the musical material contained in plaintiff's alleged musical compositions "Good Old Army" or

“Waitin For My Baby” has for many years been and now is in the public domain, and is not subject to copyright registration or to exclusive appropriation of any person or persons whatsoever, and that plaintiff has not and cannot have exclusive right or property right whatsoever, or exclusive title or interest in the same, or any part thereof.

For a Seventh Affirmative Defense, This Answering Defendant Alleges:

## XII

By reason of the matters and things set forth in paragraph XI hereinabove, plaintiff’s alleged copyrights, referred to in paragraph 5 of plaintiff’s first amended complaint, are void.

Wherefore, this answering defendant prays judgment that plaintiff take nothing by her complaint and that this answering defendant have and recover of plaintiff its attorney’s fees and costs incurred herein, and for such other and further relief as to the Court may seem proper and equitable in the premises.

GANG, KOPP & TYRE,

By /s/ MILTON A. RUDIN,

Attorneys for Defendant,  
Columbia Records, Inc.

Duly Verified.

Affidavit of service by mail attached.

[Endorsed]: Filed May 25, 1955. [75]

In the United States District Court, Southern  
District of California, Central Division

No. 17261-TC Civil

MILDRED BECKER SCHULTZ,

Plaintiff,

vs.

JACK HOLMES, CHARLES DOUGLAS HONE,  
LINDLEY A. JONES, CARL HOFFLE and  
DELMAR S. PORTER, Copartners, Individu-  
ally and as Copartners, Doing Business Under  
the Fictitious Firm Name and Style of TUNE  
TOWNE TUNES; HILL AND RANGE  
SONGS, INC., a Corporation; CAPITOL  
RECORDS, INC., a Corporation; CAPITOL  
RECORDS DISTRIBUTION CORPORA-  
TION, a Corporation; RUMBALERO MUSIC,  
INC., a Corporation; BMI BROADCAST  
MUSIC, INC., a Corporation; COLUMBIA  
RECORDS, INC., a Corporation; DECCA  
RECORDS, INC., a Corporation; RADIO  
CORPORATION OF AMERICA, a Corpora-  
tion; MGM RECORD DISTRIBUTORS,

Defendants.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on regularly for  
trial before Honorable Thurmond Clarke, Judge,  
on the 17th day of September, 1957, and having been

tried on said date, and on September 18 and 19, 1957, plaintiff appearing by Thomas P. Mahoney and Carl Hoppe, by Carl Hoppe, Esq.; defendants Jack Holmes, Charles Douglas Hone, Lindley A. Jones, Carl Hoefler, and Delmar S. Porter, individually and as copartners doing business under the fictitious firm name and style of Tune Towne Tunes; Capitol Records, Inc., and Capitol Records Distributing Corporation, appearing by Manuel Ruiz, Jr., Esq.; and defendants Hill and Range Songs, Inc.; Rumbalero Music, Inc.; BMI Broadcast Music, Inc.; Columbia Records, Inc.; Decca Records, Inc.; Radio Corporation of America, and Loew's Incorporated (herein sued as MGM Record Distributors) appearing by Gang, Kopp & Tyre by Milton A. Rudin, Esq., and Payson Wolff, Esq.; and plaintiff in open court having dismissed said action as to defendant Jack Holmes; and the issue of damages, if any and the computation thereof, having been deferred by stipulation to a determination of the liability, if any, of defendants; and evidence having been introduced on behalf of all parties, and briefs having been submitted on behalf of all parties and the cause having been finally submitted to the court for decision, the court, being fully advised in the premises, now makes its Findings of Fact and Conclusions of Law, as follows:

#### Findings of Fact

1. Plaintiff, at all times pertinent herein, was, and now is, a citizen of the United States of America.

2. Prior to April 7, 1941, plaintiff composed the words and music of a musical composition entitled "Good Old Army" and subsequently applied for and received from the United States Register of Copyrights a certificate of copyright (unpublished) on said composition, bearing No. E 254497, dated April 7, 1951.

3. Prior to July 7, 1949, plaintiff adapted the music of said "Good Old Army," composed different words, and entitled the words and music of said musical composition "Waitin' For My Baby," and subsequently applied for and received from the United States Register of Copyrights a [80] certificate of copyright (unpublished) on said composition bearing No. E 172341, dated July 7, 1949.

4. Plaintiff is sole and exclusive owner of said compositions, "Good Old Army" and "Waitin' For My Baby", insofar as said compositions may be subject to exclusive ownership, as hereinafter provided.

5. Jack Holmes composed the words and music of the original musical compositions entitled "Happy Pay Off Day" and "The Blacksmith Blues." Certificates of copyright on said "Happy Pay Off Day" and "The Blacksmith Blues" were applied for and issued by the United States Register of Copyrights.

6. Defendants herein, other than Jack Holmes, originally named as defendant, are licensees and/or assignees of certain rights to publish, publicly perform for profit, record and distribute phonograph recordings of, and otherwise exploit, said "Happy Pay Off Day" and "The Blacksmith Blues".



7. Plaintiff heard a rendition of "The Blacksmith Blues" performed on the Sid Caesar television program by the Bob Hamilton trio, over Station KRON-TV, San Francisco, on March 1, 1952.

8. "The Blacksmith Blues" was performed on the program "Your Hit Parade" over Station KRON-TV, San Francisco, on the following dates in the year 1952: April 19, April 26, May 3, May 10, May 17, May 24, May 31, June 7 and June 14. Plaintiff heard one or more of the aforesaid performances.

9. During November, 1952, plaintiff caused her then attorney, George B. White, Esq., to write to some of the defendants herein, asserting that defendants' compositions infringed upon those of plaintiff. Although definitively advised as early as April 20, 1953, by attorneys for some defendants that defendants' compositions were not infringements of those of plaintiff, plaintiff did not cause the within action to be filed until April 29, 1954, or more than two years after plaintiff's discovery of the existence of defendants' compositions.

10. Plaintiff did not submit a copy of her compositions, or either of them, to Jack Holmes or to defendants, or any of them, prior to Jack Holmes' composition of "Happy Pay Off Day" and "The Blacksmith Blues," as aforesaid.

11. It is not true that Jack Holmes, or defendants, or any of them, had ever seen a copy, or heard a performance of plaintiff's compositions, or either

of them, or in any other way were aware of the existence of plaintiff's composition prior to Jack Holmes' composition of "Happy Pay Off Day" and "The Blacksmith Blues," as aforesaid.

12. The first measure of "Happy Pay Off Day" and of "The Blacksmith Blues" utilizes some notes in common with the notes of the opening measures of "Good Old Army" and "Waitin' For My Baby"; insofar as such musical material in "Happy Pay Off Day" and "The Blacksmith Blues" bears any similarity to "Good Old Army" or "Waitin' For My Baby," such musical material was not copied or prepared from plaintiff's compositions. The common utilization by different compositions of a few notes such as herein found to exist occurs frequently in the field of popular music, particularly because of the limited number of pleasing tonal combinations within the average person's range of voice and skill.

13. There are differences in the first measure of "Happy Pay Off Day" and "The Blacksmith Blues," compared to the corresponding measures of "Good Old Army" and "Waitin' For My Baby"; these differences are apparent in each instance in which the musical material contained in said first measures appears elsewhere in said musical compositions. Among these differences are the use of a different passing tone between the mi and sol components of the triad upon which said first measures are constructed, and the fact that plaintiff's compositions contain a rest on the last half

of the final count of their respective first measures whereas Jack Holmes' compositions do not.

14. Because of these differences, the first measures of the respective compositions of plaintiff and Holmes, when performed, convey to the average listener, as well as to a person skilled in music, a substantially different musical sound, feeling and impression.

15. The construction, modulations, phrasing, musical notes, and other musical material contained in "Happy Pay Off Day" and "The Blacksmith Blues" are not similar to that of "Good Old Army" and "Waitin' For My Baby."

16. A performance of either "Good Old Army" or "Waitin' For My Baby" does not convey or give an impression to the average listener, of similarity or resemblance to "Happy Pay Off Day" or "The Blacksmith Blues," in any particular or taken as a whole.

17. Neither all of "Happy Pay Off Day" or "The Blacksmith Blues," nor any part thereof, was copied or prepared from [83] "Good Old Army" or "Waitin' For My Baby," or any part thereof.

18. It is not true that Jack Holmes or defendants, or any of them, have used the results of plaintiff's labors and incorporated the results thereof in "Happy Pay Off Day" or "The Blacksmith Blues" by the publishing, selling, and otherwise marketing of said compositions.

## Conclusions of Law

## I.

The Court has jurisdiction over this cause pursuant to the provisions of Title 28, United States States Code, section 1338. [84]

## II.

Neither of the compositions, "Happy Pay Off Day" nor "The Blacksmith Blues," are infringements upon plaintiff's compositions "Good Old Army" or "Waitin' For My Baby."

## III.

Defendants herein are not guilty of having engaged in unfair trade practices or unfair competition by their having published, sold, and otherwise marketed the compositions, "Happy Pay Off Day" and "The Blacksmith Blues."

## IV.

Defendants are entitled to judgment herein for their costs of suit incurred herein.

Let Judgment be entered accordingly.

Dated: January 8, 1958.

/s/ THURMOND CLARKE,  
United States District Judge.

Affidavit of service by mail attached.

Lodged December 26, 1957.

[Endorsed]: Filed January 8, 1958. [85]

In the United States District Court, Southern  
District of California, Central Division

No. 17261-TC Civil

MILDRED BECKER SCHULTZ,

Plaintiff,

vs.

JACK HOLMES, CHARLES DOUGLAS HONE,  
LINDLEY A. JONES, CARL HOEFLE and  
DELMAR S. PORTER, Copartners, Individu-  
ally and as Copartners, Doing Business Under  
the Fictitious Firm Name and Style of TUNE  
TOWNE TUNES; HILL AND RANGE  
SONGS, INC., a Corporation; CAPITOL  
RECORDS, INC., a Corporation; CAPITOL  
RECORDS DISTRIBUTING CORPORA-  
TION, a Corporation; RUMBALERO MU-  
SIC, INC., a Corporation; BMI BROAD-  
CAST MUSIC, INC., a Corporation; CO-  
LUMBIA RECORDS, INC., a Corporation;  
DECCA RECORDS, INC., a Corporation;  
RADIO CORPORATION OF AMERICA, a  
Corporation; MGM RECORD DISTRIBUTU-  
TORS,

Defendants.

### JUDGMENT

The above-entitled action came on regularly for  
trial before Honorable Thurmond Clarke, Judge,  
on the 17th day of September, 1957, and having  
been tried on said date, and on September 18 and

19, 1957, plaintiff appearing by Thomas P. Mahoney and Carl Hoppe, by Carl Hoppe, Esq.; defendants Jack Holmes, Charles Douglas Hone, Lindley A. Jones, Carl Hoefler, [87] and Delmar S. Porter, individually and as copartners doing business under the fictitious firm name and style of Tune Towne Tunes; Capitol Records, Inc. and Capitol Records Distributing Corporation, appearing by Manuel Ruiz, Jr., Esq.; and defendants Hill and Range Songs, Inc., Rumbalero Music, Inc., BMI Broadcast Music, Inc., Columbia Records, Inc., Decca Records, Inc., Radio Corporation of America, and Loew's Incorporated (herein sued as MGM Record Distributors) appearing by Gang, Kopp & Tyre by Milton A. Rudin, Esq. and Payson Wolff, Esq.; and plaintiff in open court having dismissed said action as to defendant Jack Holmes; and the cause having been tried by the Court, and evidence having been introduced on behalf of all parties, and briefs having been submitted on behalf of all parties, and the cause having been finally submitted to the Court for decision, and the Court being fully advised in the premises, and having heretofore made and filed its written Findings of Fact and Conclusions of Law,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed as follows:

### I.

That plaintiff, Mildred Becker Schultz, take nothing by her amended Complaint herein.

II.

That defendants Jack Holmes, Charles Douglas Hone, Lindley A. Jones, Carl Hoefler, and Delmar S. Porter, individually and as copartners doing business under the fictitious firm name and style of Tune Towne Tunes; Capitol Records, Inc. and Capitol Records Distributing Corporation, **have** judgment for their costs of suit in the amount of \$. . . . . [88]

III.

That defendants Hill and Range Songs, Inc., Rumbalero Music, Inc., BMI Broadcast Music, Inc., Columbia Records, Inc., Decca Records, Inc., Radio Corporation of America, and Loew's Incorporated (herein sued as MGM Record Distributors), have judgment for their costs of suit in the amount of \$125.94.

IV.

The Clerk is ordered to enter this Judgment forthwith.

Dated: January 8, 1958.

/s/ THURMOND CLARKE,  
United States District Judge.

Lodged: December 26, 1957.

[Endorsed]: Filed and entered January 8, 1958.

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Mildred Becker Schultz, plaintiff in the above-entitled cause, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on January 8, 1958.

MILDRED BECKER  
SCHULTZ,

By /s/ CARL HOPPE,  
One of Her Attorneys.

[Endorsed]: Filed February 6, 1958. [109]

---

In the United States District Court, Southern  
District of California, Central Division

No. 17261-TC Civil

MILDRED BECKER SCHULTZ,

Plaintiff,

vs.

JACK HOLMES, CHARLES DOUGLAS HONE,  
LINDLEY A. JONES, CARL HOEFLE and  
DELMAR S. PORTER, Copartners, Individu-  
ally and as Copartners, Doing Business Under  
the Fictitious Firm Name and Style of TUNE  
TOWNE TUNES, HILL AND RANGE  
SONGS, INC., a Corporation; CAPITOL  
RECORDS, INC., a Corporation; CAPITOL



RECORDS DISTRIBUTING CORPORATION, a Corporation; RUMBALERO MUSIC, INC., a Corporation; BMI BROADCAST MUSIC, INC., a Corporation; COLUMBIA RECORDS, INC., a Corporation; DECCA RECORDS, INC., a Corporation; RADIO CORPORATION OF AMERICA, a Corporation; MGM RECORD DISTRIBUTORS,

Defendants.

Honorable Thurmond Clarke, Judge, presiding.

REPORTER'S TRANSCRIPT  
OF PROCEEDINGS

Tuesday, September 17, 1957, 10 A.M.

The Clerk: Case No. 17,261-TC Civil, Schultz vs. Holmes, et al., for trial.

The Court: Where is Mr. Mahoney?

Mr. Hoppe: Mr. Mahoney won't be here this morning, your Honor.

The Court: Oh, I see.

Mr. Hoppe: I am Carl Hoppe from San Francisco.

Mr. Ruiz: I don't see either Mr. Rudin or Mr. Wolff either. Mr. Wolff is associated with Mr. Rudin.

The Court: We will go ahead and proceed. This Court runs on time, just like the Santa Fe Super Chief. If they are here, all right, and if they are not, all right. Go ahead and make your statement.

OPENING STATEMENT ON BEHALF  
OF PLAINTIFF

By Mr. Hoppe:

May it please the Court:

This is a copyright infringement suit, involving musical copyright.

The Court: Yes.

Mr. Hoppe: The plaintiff is Mildred Becker and she wrote two songs which were Copyrighted. One of them was "Good Old Army" and the other one was "Waitin' for My Baby." These two songs have the same musical theme in them, and it [6\*] is the musical theme with which we are concerned rather than the title to the music or the words of the music.

The Copyrights were obtained, in 1941 for "Good Old Army" and in 1949, for "Waitin' For My Baby."

In 1950, a man by the name of Jack Holmes, also known as Hone, wrote two pieces of music, using what we say is the same theme, the same musical theme. One of the songs is "Happy Pay Day" or "Happy Pay Off Day" and the other one is "The Blacksmith Blues."

The theme became what you and I would call a best seller, and the plaintiff, Mrs. Schultz, who had been Miss Becker at the time she got her Copyrights, heard the theme on the TV, gave notice to the several defendants and filed this suit.

---

\*Page numbering appearing at top of page of original Reporter's Transcript of Record.

This suit has been pending, as your Honor is aware of, for a number of years.

One of the things we have to prove, will of course be originality. Another thing we will have to prove will be infringement.

Now, infringement in a copyright suit is somewhat different than it is in a patent infringement suit. We have to show not only similarity to make infringement, but we have to show copying.

Now, so far as the similarity is concerned, I think that as the evidence unfolds and you will hear the two [7] pieces of music, there will be no doubt in your Honor's mind but that the two pieces of music are, well, what I would say the same so far as the theme is concerned.

We have a more difficult problem on the question of access. We have no direct evidence that Jack Holmes, the recorded author of "The Blacksmith Blues" and "Happy Pay Day" or "Happy Pay Off Day" ever actually saw or heard Mrs. Schultz's music. However, we have good circumstantial evidence. The circumstances are as follows:

Mrs. Schultz, when she was Miss Becker, plugged this song substantially up and down the Coast, in San Francisco and also in Los Angeles.

Mr. Ruiz: What was that word, counsel? I didn't hear that.

Mr. Hoppe: Plugged.

The Court: Plugged.

We are just having the opening statement, Mr. Wolff.

Mr. Wolff: Thank you, your Honor. Mr. Rudin will be here in just a moment.

The Court: All right.

Mr. Wolff: Judge Hall has him on the "carpet" in there.

The Court: Yes, I know.

Mr. Wolff: He will be here shortly.

The Court: Go right ahead [8]

Mr. Hoppe: And then there is such an unusual similarity between the unique theme of my client's music and the theme of "Blacksmith Blues" and "Happy Pay Off Day" or "Happy Pay Day" that we will ask the Court to draw the inference that there must have been access, because otherwise, this remarkable similarity couldn't have come about, sort of the application of the *res ipsa loquitur* rule of ordinary torts to this copyright case.

Now, in the pleadings we ask for the defendants to account for the number of pieces of music they have produced.

So we intend to put in no direct evidence, at this time, as to the extent of damages and ask the Court to set that down for special hearing in the event that there is a determination that there is liability. That is quite common in cases of this type.

The Court: Yes, that is right.

Mr. Hoppe: And I think it is better than to encumber the record as to a lot of damages if there aren't any damages.

The Court: That is right. I agree with you.

Mr. Hoppe: Now, if the defendants care to make a statement, I will wait for them.

The Court: Mr. Ruiz is here. Do you want to make a statement?

The Clerk: Mr. Wolff is here. Mr. Rudin is still in [9] another Court.

OPENING STATEMENT ON BEHALF  
OF CERTAIN DEFENDANTS

By Mr. Ruiz:

There are numerous defendants, your Honor, and I represent the defendants Carl Hoeffle and Delmar S. Porter——

The Court: Yes; I have that.

Mr. Ruiz: ——doing business as Tune Towne Tunes; Capitol Records, Inc., and Capitol Records Distributing Corporation.

Jack Holmes, Charles Douglas Hone, has never been served in this action, as a consequence of which I would like at this time to make a motion for dismissal.

The Court: All right; I will grant it.

Mr. Hoppe: He is dead, your Honor.

Mr. Ruiz: There was an estate at the time.

The Court: All right. We will grant that motion.

Mr. Ruiz: I think the evidence will show that there is no originality whatsoever in the unpublished copyrighted songs known as "Good Old Army" and "Waitin' For My Baby."

Counsel says that he has no direct evidence that the decedent, Jack Holmes, ever saw or heard the melody and I am almost inclined to, on the opening

statement, make a motion to dismiss the entire case, because counsel has stated that it is a necessary element to prove that there must have been access and he is going to ask this Court to draw some sort of an inference based upon what is called a [10] unique theme.

The Court will have an opportunity to hear all of the songs involved. There are four in number. The first one, which is "Good Old Army," was purportedly conceived at about the time of the beginning of the War, and later on, some nine years later, that was changed by the plaintiff with respect to the title and called "Waitin' For My Baby."

With respect to the so-called infringing songs, there are two in number. The first one is "Happy Pay Off Day," which was subsequently changed in so far as title is concerned, to "Blacksmith Blues."

I believe that the evidence will show that these pieces have around 32 bars in substance and that out of those 32 bars there is a remote similarity with respect to only 7 notes and that is all.

The Court: All right. Do you want to make a statement, Mr. Wolff?

Mr. Wolff: I am sorry, your Honor, that I didn't hear the entire statement of counsel.

The Court: He was just reviewing what he wanted to prove. I was just trying to use the Court's time.

Mr. Wolff: I appreciate that, your Honor. I think I will forego an opening statement at this time.

The Court: What will we do about Mr. Rudin? Is he down [11] the hall?

Mr. Wolff: He is just on a matter of pleading in a criminal matter and I don't believe it will take more than a minute or two. If your Honor wishes, I will be glad to go down there and check?

The Court: Go down and find out. Tell him I am just sitting here ready to start.

(A short intermission.)

The Court: We understood, Mr. Rudin, that you were occupied down the hall on an indigent panel appointment?

Mr. Rudin: I am sorry. I couldn't help it.

The Court: Well, we understand.

Mr. Rudin: Your Honor, we were appointed by Judge Hall.

The Court: All right. Do you want to make a statement at all, Mr. Rudin? They just reviewed the facts.

Mr. Rudin: No. I think we might as well start.

The Court: All right. You may call your first witness.

(Whereupon, the Plaintiff, to maintain the issues on her behalf, offered and introduced the following evidence, to wit:)

Mr. Hoppe: Mrs. Schultz. [12]

**MILDRED BECKER SCHULTZ**

the plaintiff herein, called as a witness on her own behalf, being first duly sworn, testified as follows:

The Clerk: Please state your name for the record.

A. Mildred Becker Schultz.

Mr. Hoppe: Your Honor, the witness is the plaintiff in this case, but before examining her I would like to identify the documentary and physical exhibits that we will use during the course of her examination.

As Plaintiff's Exhibit No. 1, we offer in evidence the Certificate of Copyright Registration, Class E unpublished, No. 254497, dated April 7, 1941, covering the title of the words and music to "Good Old Army."

As Plaintiff's Exhibit 2——

Mr. Rudin: May we see that, counsel?

Mr. Hoppe: Yes.

Mr. Rudin: Is this all you are offering, counsel?

Mr. Hoppe: That is Plaintiff's Exhibit 1.

Mr. Rudin: Well, do you have the——

Mr. Hoppe: Now, if you will wait until we are through, counsel. There are separate pages, counsel.

Mr. Rudin: All right.

Mr. Hoppe: As Plaintiff's Exhibit 2 we offer in evidence a copy of the words and music, "Good Old Army," bearing the Deposit stamp, Copyright Deposit, Library of Congress, United [13] States of America, and bearing the notation E unpublished 254497, which exhibit is presently attached to the



(Testimony of Mildred Becker Schultz.)

Amended Complaint filed on March 18, 1955, as Exhibit 1.

That, counsel, is one that goes with the one I have just handed to you.

Mr. Rudin: Yes.

Mr. Hoppe: As Plaintiff's Exhibit 3, we ask the clerk to mark for identification at this time, and we do not offer it, the piece of sheet music entitled "Good Old Army," which is a 4-piece document.

Mr. Rudin: That is for identification?

Mr. Hoppe: That is for identification only.

(Said document was marked as Plaintiff's Exhibit 3 for identification.)

Mr. Hoppe: As Plaintiff's Exhibit 4, we offer in evidence Certificate of Registration of Claim to Copyright in a Musical Composition No. E unpublished 172341.

As Exhibit 5, we offer in evidence the sheet music "Waitin' For My Baby," bearing the Copyright stamp "Copyright Deposit Library of Congress United States of America" and the notation E unpublished 172341.

As Exhibit 6, we wish to have marked for identification, but we do not offer in evidence, a four-page piece of sheet music entitled "Waitin' For My Baby."

(Said document was marked as Plaintiff's Exhibit 6, for identification.) [14]

Mr. Hoppe: As Exhibit 7, we ask the clerk to mark for identification, but we do not offer in evi-

(Testimony of Mildred Becker Schultz.)

dence, a photostatic copy of Exhibit 6 for identification.

(Said document was marked as Plaintiff's Exhibit 7, for identification.)

Mr. Wolff: Counsel, may we understand, as between 6 and 7, what is the difference?

Mr. Hoppe: That (indicating) is the original and this (indicating) is a photostat.

Mr. Wolff: Of the same thing?

Mr. Hoppe: Of the same thing.

As Exhibit 8, we offer in evidence a piece of sheet music entitled "The Blacksmith Blues" published by Hill and Range Songs, Inc., and having a picture of Ella Mae Morse on the front. That is an alleged infringing publication, your Honor.

As Plaintiff's Exhibit 9, we offer in evidence the alleged infringing publication "Happy Pay Off Day," Capital record, No. 5576-Y, by Mickey Katz and his Orchestra.

As Exhibit 10, we offer in evidence another alleged infringing publication, a Decca record No. 27045, entitled "Happy Pay Day" by Sonny Burke and his Orchestra.

As Plaintiff's Exhibit 11, we offer in evidence another alleged infringing publication, a Capitol record, No. 1693, [15] entitled "The Blacksmith Blues" by Ella Mae Morse, the singer, with Orchestra Conducted by Nelson Riddle.

Mr. Ruiz: Counsel, for the purpose of my record, will you tell us which exhibits are marked for identification on your list there?

(Testimony of Mildred Becker Schultz.)

Mr. Hoppe: Exhibits 3, 6 and 7 are for identification.

Mr. Ruiz: Three, 6 and 7. And the balance are offered?

Mr. Hoppe: The balance are offered.

Mr. Wolff: We have no objection to any of these items, except 3, 6 and 7 which are at this time I understand only offered for identification.

Mr. Hoppe: That is right.

Mr. Ruiz: On behalf of my clients, I understand that Exhibit No. 1, which was originally offered, indicates that the melody was copyrighted, is that correct, counsel?

Mr. Hoppe: Yes, words and melody.

Mr. Ruiz: Words and melody. Therefore, I object to any introduction into evidence of anything other than the melody, and more specifically the portion of the sheet music "Blacksmith Blues" that excludes the melody, that is to say, other than the melody, the base, etc., the chords, etc.

I object to Exhibit 9 being introduced into evidence, being a record of Mickey Katz and his Orchestra.

I don't know how we are going to be able to dissect the melody from the balance of the composition, if it is to be [16] played. Nevertheless, it will be important in this case. Therefore, I object to it. It is not Copyrighted and it is not intended to be a portion of this case.

I object to the Exhibit 10, being offered in evidence because that likewise is a record which has

(Testimony of Mildred Becker Schultz.)

other matters concerning chords, other than the melody.

And I object to Exhibit 11, the Capitol record, likewise, because, as I understand, we are concerned here only with a theme, as indicated by counsel in his opening statement, which is a melody, and the Copyrighted matter which the plaintiff is seeking protection on before this court has to do only with a melody; and for that reason I object to the introduction of anything but the melody as Copyrighted in this case.

Mr. Hoppe: Your Honor, we can't take the melody off of the records.

The Court: I will overrule the objection. They will be received. They will all be received.

The Clerk: Those will be Plaintiff's Exhibits 1, 2, 4, 5, 8, 9, 10 and 11 in evidence.

(Said documents and records were received in evidence as Plaintiff's Exhibits 1, 2, 4, 5, 8, 9, 10 and 11.)

#### Direct Examination

By Mr. Hoppe:

Q. Would you please state your name, Mrs. [17] Schultz? A. Mildred Becker Schultz.

Q. And Becker is your maiden name?

A. Yes, sir; it is.

Q. Where do you live, Mrs. Schultz?

A. At 2325 Casa Bona Avenue, Belmont, California.

(Testimony of Mildred Becker Schultz.)

Mr. Wolff: Will you talk a little louder, Mrs. Schultz, please?

The Witness: All right.

Q. (By Mr. Hoppe): Mrs. Schultz, have you ever been a witness in a lawsuit before?

A. No, sir.

Q. How old are you, Mrs. Schultz?

A. I am 37.

Q. And you are the plaintiff in this action?

A. Yes, sir.

Mr. Hoppe: May I approach the witness, your Honor?

The Court: That is all right; any time.

Q. (By Mr. Hoppe): Mrs. Schultz, I show you a document which is in evidence as Plaintiff's Exhibit 2, and ask you if you recognize it?

A. Yes, sir; I do.

Q. What is Plaintiff's Exhibit 2?

A. It is a copy of the original manuscript that I sent into Washington to have Copyrighted. It is a photostatic copy. [18]

Q. And what is shown on Plaintiff's Exhibit 2?

A. A seal from the Library of Congress.

Q. No. What is that representation? Is it music and words?

A. Yes, sir; it is. It is the music and words.

Q. To what song? A. "Good Old Army."

Q. And who wrote "Good Old Army"?

A. I wrote "Good Old Army."

Q. When did you write "Good Old Army"?

A. In 1941.

(Testimony of Mildred Becker Schultz.)

Q. Would you tell us how you composed the piece?

A. I was walking uptown in Redwood City with a girl friend and we ran into a friend of ours who was either drafted or enlisted in the Army, and we asked him how he liked the Army and he returned, he said, "I love it."

After leaving this friend and continuing my walk uptown, the words started running through my head, "Work-in' for the Army, Slavin' for the Army! Breakin' my back, I ain't gettin' no Jack, but I love it," and that is the way that song came to me, while I was walking.

Q. How did the melody come to you?

A. Well, it was or less the way I was walking, as I walked, the beat of my walk, and with the words running through my head. That is the way it came to me. [19]

Mr. Hoppe: Mrs. Schultz, since we can't indicate music to lay ears very easily, I wonder if it would be proper for her to hum the tune to us?

The Court: Oh, yes; certainly.

Q. (By Mr. Hoppe): Would you hum to us, the melody?

The Witness: Can I say the tune?

Mr. Hoppe: Yes, if you will.

A. (Humming): "Work-in for the Ar-my, slav-in for the Ar-my! Breakin' my back, I ain't get-tin' no Jack, but I love," Love "It; yes, I love it; marchin' a-long, sing-in' a song, to-tin a gun, always be-in' on the run for the Ar-my, good old

(Testimony of Mildred Becker Schultz.)

Ar-my, oh many people thing its rough, many people think its tough, they ain't rib-bin', they're not kiddin', they're just fool-in themselves—be-in' a soldier, tak-in' the or-ders al-ways with a smile, while I'm walkin' those miles for the Ar-my, that good old a—my, -my!"

Mr. Wolff: If your Honor please, I must object to the plaintiff's rendition of her own composition, on the ground that she did not faithfully reproduce the notes that are written on the page.

The Court: Well, I think it is for the purpose of illustration. I think with that I will overrule the objection. [20]

Q. (By Mr. Hoppe): Now, Mrs. Schultz, after you obtained your Copyright, Plaintiff's Exhibit 1, of the music which is in evidence as Plaintiff's Exhibit 2, what did you do with the song, "Good Old Army"?

The Witness: I beg your pardon, sir. Did you say after it was Copyrighted?

Q. (By Mr. Hoppe): Yes.

The Witness: What is the next step I took?

Q. (By Mr. Hoppe): What did you do with the music and melody?

A. Well, I went downtown to the Union Music House to see if I could have an arrangement made. I tried to write an arrangement myself, but it didn't work out; I don't know enough about music. I went down and I was sent to a Mr. Frank Fuller, a professional arranger, who wrote me out a piano arrangement of it.

(Testimony of Mildred Becker Schultz.)

Q. Would you state what Plaintiff's Exhibit 3 is?

A. It is a printed copy of the original manuscript that Mr. Fuller wrote for me. It is in his handwriting.

Q. And is this what you call the piano arrangement?      A. Yes, sir.

Q. Now, what did you do?

Mr. Rudin: Your Honor, I object to this line of questioning upon the question of an arrangement which is not copyrighted. By way of explanation, this was something [21] attached to the original Complaint which we objected to. There is only one copyrighted version or two copyrighted versions before this Court, and they are basically Plaintiff's Exhibits 1 and 2 as a unit and Plaintiff's Exhibits 4 and 5. And Plaintiff's Exhibit 3, something that someone else wrote, unless there is something to tie it up to somebody, is entirely immaterial, irrelevant and incompetent to any issues in this case.

Mr. Ruiz: The same objection.

The Court: Well, I think Mr. Rudin's objection is good, unless it is tied up.

Mr. Hoppe: No. Now, your Honor, we are going to go into that and I am going to show that the melody is the same as the other melody, and that this is the particular version of the song that was published and distributed to the people in the industry.

Mr. Ruiz: I have a further objection, your



(Testimony of Mildred Becker Schultz.)

Honor. I also object to the testimony of the witness to the effect that after the melody was copyrighted she then took it to an arranger who arranged it, and, therefore, the arrangement is no part of the copyrighted matter.

The Court: Well, I think at this stage of the proceedings, I will overrule the objection. Counsel says he is going to tie it in.

Mr. Rudin: All right, your Honor, subject to a motion to [22] strike from the evidence later on.

The Court: All right. I have to give him some latitude here.

Q. (By Mr. Hoppe): Now, would you please sing the melody in Plaintiff's Exhibit 3 for identification?

Mr. Ruiz: Could we have a copy of that, counsel, please?

Mr. Hoppe: I produce and will hand a copy to counsel.

Mr. Rudin: Would it help any if the plaintiff plays the piano? We have brought a piano into court.

Mr. Hoppe: The plaintiff can't play the piano. She can just sing.

Mr. Rudin: I am sorry. It is more accomplishment than I have, counsel.

Mr. Hoppe: Would you please sing the melody of that, Mrs. Schultz?

A. Yes; I will.

(Singing): "Work-in for the Ar-my, slav-in for the Ar-my! Breakin' my back, I ain't gettin'

(Testimony of Mildred Becker Schultz.)

no Jack, but I love—love it, yes! I love it; marchin' a-long, sing-in' a song, to-tin' a gun, al-ways be-in' on the run for the Ar-my, good old Ar-my, oh, many people thinks its rough, ma-ny people think its tough, they ain't kid-din', they ain't ribbin', they're just fool-in themselves; be-in' a solder, tak-in' the or-ders, al-ways with a smile, while I'm walkin' those miles for [23] the Ar—my, good old A—my, -my!"

Mr. Wolff: If your Honor please, I will interpose the same objection as to Mrs. Schultz's renditions of the music, that is Plaintiff's Exhibit 3.

Mr. Hoppe: Again?

Mr. Ruiz: Is that right, counsel, this is Plaintiff's Exhibit 3 that she sang from?

Mr. Hoppe: She sang from Exhibit 3.

Mr. Wolff: To Exhibit 3, I object in that 5 or 6 places I believe she made a misstatement of the music or a misrendition of the music; also that this arrangement is not involved as a copyrighted piece.

The Court: I overrule the objection, Mr. Wolff, and let it remain.

Q. (By Mr. Hoppe): Now, Mrs. Schultz, what did you do with sheets of music such as Plaintiff's Exhibit 3?

A. Well, I got these sheets of music and took them around to the various night clubs.

Q. How did you get the sheets of music?

A. Well, I took the original music that Mr. Fuller wrote out for me and I took it to a printing place and had about 500 sheets run off.

(Testimony of Mildred Becker Schultz.)

Q. And what did you do with the 500 sheets of music that you had run off?

A. Well, I took them every place I saw a band or heard [24] that somebody was there, to see if I could plug it and create a demand or do something with it, in order to——

Q. Would you place a time for that, Mrs. Schultz, give it as closely as you can?

A. Well, it must have been a few weeks after I received my copyright.

Q. But do you recall what year it was in?

A. It was in 1941.

Q. And in the year 1941, to what—where did you distribute Plaintiff's Exhibit 3 for identification?

A. Well, I took it to the Golden Gate Theatre.

Q. Where is the Golden Gate Theatre?

A. That is on Taylor; Taylor and Market, in San Francisco.

Mr. Wolff: Counsel, do you have the time that the Golden Gate Theatre gave access to the defendants in this action?

Mr. Hoppe: You weren't here during my opening statement, counsel.

Mr. Wolff: I am sorry.

Mr. Hoppe: I said as far as I know we have no direct proof of access; that our whole proof is going to be circumstantial. It was played at so many different places that as a consequence we are going to draw the inference that there must have been access.

(Testimony of Mildred Becker Schultz.)

Mr. Ruiz: Unless counsel likewise intends to indicate [25] that Jack Holmes might have been at any of these places and unless counsel at this time can state that he can tie that up, I believe all of this will be immaterial.

Mr. Hoppe: I don't believe so, counsel, but I don't propose to argue the legal aspects of our case until all the evidence is in.

Mr. Ruiz: That is the reason I propose to the court that counsel at this time state whether or not he intends to indicate that Mr. Jack Holmes was at any of these places or may have heard the music of any of these persons that she may have handed a copy of this to.

If he intends to tie it up that way, it is all right.

The Court: I overrule the objection.

Mr. Rudin: Your Honor, so we won't have to object each time, may be have an objection to the entire line of any distribution of music?

The Court: Yes. All right. You will have a continuing objection to this line of testimony.

Mr. Hoppe: I think for the purpose of clarity, your Honor, it will be understood that objection will go to this entire line, because it is going to take about 20 minutes.

The Court: Yes. That is what I understand. Mr. Rudin made that statement.

Q. (By Mr. Hoppe): Now, at the Golden Gate Theatre, [26] to whom did you show a piece of music there?

A. To Maxine Andrews of the Andrews Sisters.

(Testimony of Mildred Becker Schultz.)

Q. What did you do at that time?

A. You mean what happened at that occasion?

Q. Yes; what happened at that occasion?

A. Well, I don't remember too clearly, but I showed it to Maxine Andrews.

Q. You showed what, the sheet music?

A. The sheet music, to Maxine Andrews and she was interested in it, and I believe the text of the conversation, as I recall, was that she would have to show it to her husband.

Q. Did you leave her a piece of sheet music?

A. Yes; I left a piece of sheet music.

Mr. Rudin: Your Honor, I would like to urge the further objection that it is all hearsay evidence as to any of the defendants in this action, what Miss Andrews did or said.

The Court: I will let that part go out as hearsay.

Mr. Rudin: As to any conversation with Maxine Andrews.

The Court: That is right.

Q. (By Mr. Hoppe): Did you hear Maxine Andrews play the piece of music you left with her?

A. No, sir; I didn't.

Q. Did you ever hear the piece of music played at the [27] Golden Gate Theatre? A. No, sir.

Q. Now, where else did you take a sheet of music such as Plaintiff's Exhibit 3?

A. I took it to the Lion's Den.

Q. To where? A. Lion's Den.

Q. Where is the Lion's Den?

(Testimony of Mildred Becker Schultz.)

A. On Grant Avenue, in China Town, in San Francisco.

Q. What is the Lion's Den?

A. It is a night club.

Q. And what did you do with the sheet music at the Lion's Den?

A. I gave it to the piano player.

Q. And what did he do with the piece of music?

A. He played it before the people there and then the rest of the orchestra improvised on it and played it, and the people got up and danced to it.

Q. Where else did you take sheet music like Plaintiff's Exhibit 3 for identification?

A. Forbidden City.

Q. Where is the Forbidden City?

A. On Stockton and Sutter Streets, in San Francisco.

Q. And what did you do with the piece of sheet music at [28] the Forbidden City?

A. I took it to the conductor of the orchestra, who happened to be a piano player.

Q. And what did he do with it?

A. He played it, and then he had his arranger make an orchestration of it.

Q. And what was done with the orchestration of it?

A. It was played before the people in the place and they danced to it.

Q. Is the Forbidden City a night club also?

A. Yes, sir; it is.

(Testimony of Mildred Becker Schultz.)

Q. Do you recall any other place where you took Plaintiff's Exhibit 3 for identification?

A. The 365 Club.

Q. Where is the 365 Club?

A. That is 365 Market Street in San Francisco.

Q. And what is the 365 Club?

A. It is also a night club.

Q. And what did you do with Plaintiff's Exhibit 3 for identification at the 365 Club?

A. I turned it over to somebody in the orchestra and they played it.

Q. Now, can you think of any other place where you took Plaintiff's Exhibit 3 for identification?

A. The Seven Seas. [29]

Q. The Seven Seas is located where?

A. I am not sure whether it is Eddy or Ellis Street. It is somewhere in the downtown area, a few blocks off Market Street.

Q. On Ellis or Eddy Street a few blocks off of Market Street in San Francisco. What is the Seven Seas?

A. It is a night club with the Hawaiian theme to it and they had I believe the Hurtado Brothers, a Marimba band in it.

Q. They had whom?

A. I am not sure. It was a Marimba band.

Q. It was a marimba band. What did you do with Plaintiff's Exhibit 3 at the Seven Seas?

A. I turned it over to the orchestra and they played it.

Q. Where else did you take Plaintiff's Exhibit

(Testimony of Mildred Becker Schultz.)

3 for identification?           A. To Monaco's.

Q. What is the location of Monaco's?

A. That is on Pacific Street in San Francisco, or it was.

Q. And what is Monaco's?

A. A theatre-restaurant with a cocktail lounge.

Q. And what did you do with Plaintiff's Exhibit 3 for identification?

A. I turned it over to—I believe she played the organ—a woman by the name of Melba. [30]

Q. What did Melba do with Plaintiff's Exhibit 3 for identification?

A. She played it in the cocktail lounge.

Q. Now, Mrs. Schultz, were there any other places that you can think of?

A. Yes, sir; there is the Riviera.

Q. And what is the Riviera and where is it located?

A. The Riviera was located on Columbus Avenue, and there was a girl in there playing an organ by the name of June.

Q. And what did the girl by the name of June do with Plaintiff's Exhibit 3 for identification?

Mr. Rudin: Pardon me. Your Honor, I don't believe Mr. Ruiz will join in this, but just to save the court's time, we would be willing to stipulate that if the plaintiff continued to testify, she would go on for a number of times and testify, I am not stipulating the fact but that she would testify that she took this music around to a number of the night spots and bars and restaurants in the nature of bars



(Testimony of Mildred Becker Schultz.)

and night clubs and showed it to people there who played it, and some of them played it and some of them didn't play it, that it would be her testimony that it was played at a number of night clubs in San Francisco; we will stipulate that it was played at a number of night spots in San Francisco, but will not [31] stipulate the fact; to shortcut this a little bit.

Mr. Ruiz: I would join in that stipulation, providing we encompass the period of time which I understand is the year 1941.

Mr. Hoppe: That is agreeable with the plaintiff as the rest would just be repetition.

The Court: Was that in the year 1941?

A. Yes; it was.

Mr. Hoppe: We make the stipulation.

Mr. Rudin: Yes, the year 1941. That is what her testimony would be. We will not stipulate to the facts.

Mr. Hoppe: No. We just stipulate to the fact that she would testify to taking it to a number of places.

Q. Now, are all the places concerning which you have testified to, Mrs. Schultz, in the year 1941 and the added places that your testimony would bring out located in San Francisco?

A. I didn't hear you, sir.

Q. Are all the places concerning which you have testified located in San Francisco?

A. Yes; I believe they are.

Q. What, if anything, did you do with sheet

(Testimony of Mildred Becker Schultz.)

music like Plaintiff's Exhibit 3 for identification outside of the San Francisco area? [32]

A. Well, I know I sent one copy to, I believe it is Schumann Music Company, a publishing company in Hollywood, I believe, or Los Angeles, I am not sure which.

Q. Schumann Music Company in Los Angeles?

A. Yes.

Q. Are there any other places that you can think of that you sent Plaintiff's Exhibit 3 for identification outside of the San Francisco area?

A. In 1941 all I can remember offhand is the one that I sent to the Schumann Music Company.

Mr. Hoppe: Your Honor, we offer in evidence Plaintiff's Exhibit 3 for identification as Plaintiff's Exhibit 3.

Mr. Rudin: Your Honor, I object to that on the grounds that the Schumann Music publishing company is not a defendant in this action nor related to any of the defendants in this action. There is no tie-up of Exhibit 3 as having had any access to any of the defendants here. As a matter of fact, the testimony as to Schumann Music Company didn't go as far as to say that they received it. Schumann Music Company is not a defendant here. This is a copyright infringement action. They have to stand or fall on their copyright, and, therefore, Exhibit 3, insofar as it has any base arrangement or beat or varies from the copyright, is immaterial. [33]

The Court: She testified about it. I will overrule the objection and let it be received.

(Testimony of Mildred Becker Schultz.)

Mr. Ruiz: I have an additional objection, your Honor——

The Court: Yes. Pardon me, Mr. Ruiz.

Mr. Ruiz: ——at this time, with respect to Exhibit 3, concerning the base, clef, words and other matters, other matters than what she hummed from the witness stand, as being immaterial, and that the evidence be restricted solely to the melody which is the matter which is copyrighted and before this court.

The Court: Well, I will overrule the additional objection, Mr. Hoppe, and let it be received as Exhibit 3.

Mr. Hoppe: Thank you, your Honor.

(Said document was received in evidence and marked as Plaintiff's Exhibit 3.)

Q. (By Mr. Hoppe): Now, Mrs. Schultz, I call your attention to Plaintiff's Exhibit 5 in evidence, which is the sheet music "Waitin' for My Baby," number 172341, and ask you what you did after you obtained that particular copyright?

A. Well, I had about 20 copies photostated to distribute, to see if I could plug it, again, and I took it to various people.

Q. And I would like it if you would sing Plaintiff's [34] Exhibit 5 for us; would you sing Plaintiff's Exhibit 5 as copyrighted, which is the copyright number 172341?

The Witness: May I say, sir, that I am not a singer and I only sing the best I can?

(Testimony of Mildred Becker Schultz.)

Mr. Ruiz: We weren't objecting because of the fact that the witness is not a singer. She just wasn't singing the correct tones.

The Court: All right.

Q. (By Mr. Hoppe): Would you sing that piece of music as you read it?

A. (Singing): "Waitin' for my baby, please don't say maybe, let's set the date, cause I just can't wait, for I love, love you, yes, I love you, let's go find a Parson, to change your name to Carson. We'll be on our way to a hide a way. In the Val—ley, yes, the Val—ley. Oh, people think we're not so wise, but we know it's otherwise, they're not kid-din', they're not rib-bin, they're just foolin' them-selves, think it over, Baby, please don't say maybe, just say you'll be mine, and I'll be easy to find 'cause I lo—ve you, how I love you, Baby."

Mr. Wolff: Now, the same objection, if your Honor please.

The Court: All right. Overruled.

Q. (By Mr. Hoppe): Now, Plaintiff's Exhibit 6, what is Plaintiff's Exhibit 6? [35]

A. It is the original manuscript that I wrote for "Waitin' for My Baby," but I copied it from the original "Good Old Army."

Mr. Rudin: Just a minute. Would the reporter read that answer?

(Answer read by the reporter.)

Q. (By Mr. Hoppe): You mean from the original, 172341, that is this one here, "Waitin' for My

(Testimony of Mildred Becker Schultz.)

Baby"? A. That is "Waitin' for My Baby."

Q. Now, this has unpublished number 172341 on it, on the front page; where did you get that number? A. Well, I recopied it.

Q. And that is from this Plaintiff's Exhibit 5 in evidence, is that right?

The Witness: May I look at the number sir?

Mr. Hoppe: Yes. You look at the numbers.

A. Well, this number here, this is the copyright number for "Waitin' for My Baby," isn't it, this 17——

Q. That is right.

The Witness: And "Good Old Army" has another number.

Q. (By Mr. Hoppe): That is right.

Now, on the front of Plaintiff's Exhibit 6 for identification, you have copyright number 172341, do you not? A. Yes, sir. [36]

Q. Now, I would like you to tell me how Plaintiff's Exhibit 6 came into being?

A. "Waitin' for My Baby?"

Q. Yes; that is this piece of paper that I have right here.

A. Well, I wrote the "Good Old Army Blues" in 1941, just before the War, and it was a good piece of music but the words weren't, I suppose, too patriotic during war time and I thought I had better put some other words to it so I could do something with it. So it took me all my time to think of anything that would fit that melody. The melody is still "Good Old"—"Working for the Army," but

(Testimony of Mildred Becker Schultz.)

then my girl friend and I rewrote it to "Waitin' for My Baby."

Mr. Hoppe: I don't think you understood my question, Mrs. Schultz.

Q. What did you do with this particular piece of paper, not the song, but this particular piece of paper?

A. Oh, I took the arrangement that Mr. Fuller made for me for "Good Old Army" and I copied the music from his arrangement and tried to rewrite some of the notes to fit the words in "Waitin' for My Baby."

Q. And that is how this Plaintiff's Exhibit 6 came into being? A. Yes, sir. [37]

Q. Then after you did that with this Plaintiff's Exhibit 6, what did you do with the piece of paper?

A. Well, I gave it to my husband, who was working for the American Can Company at the time, in the photostat and blue print department, and he ran off about 20 copies for me.

Q. And what is Plaintiff's Exhibit 7 for identification? A. That is a photostatic copy.

Q. Now, would you sing the melody of Plaintiff's Exhibit 6? And, your Honor, this will be the last singing we will have.

Mr. Rudin: Do we understand that Plaintiff's Exhibit 6 is any different than Plaintiff's Exhibit 5?

Mr. Hoppe: Plaintiff's Exhibit 5 has just the melody in it. Plaintiff's Exhibit 6 has the melody and the base.

Mr. Rudin: Well, is she singing the base?

(Testimony of Mildred Becker Schultz.)

Mr. Hoppe: She is singing the melody.

Mr. Rudin: Well, is it the same as Plaintiff's Exhibit 5?

Mr. Hoppe: The melody, yes.

Mr. Rudin: Well, she has already sang it, your Honor.

The Court: All right. She has already completed that.

Mr. Rudin: You don't need to do it, then, again.

Mr. Hoppe: Well, you sang it.

The Court: We will take about a five-minute recess.

Mr. Hoppe: All right. [38]

The Court: We will take a five-minute recess.

Mr. Hoppe: Thank you, your Honor.

(Recess.)

The Court: Just come to order. She will resume the stand again. All right.

Q. (By Mr. Hoppe): We were discussing Plaintiff's Exhibit 7 when recess was declared, and I wonder if you would tell me what you did with the photostats such as Plaintiff's Exhibit 7 for identification?

A. You mean where I took them?

Q. What did you do with these photostats that your husband made, such as Plaintiff's Exhibit 7 for identification?

A. I took them out and plugged them also. I took them around to various night spots and people to see if I could do something with them.

(Testimony of Mildred Becker Schultz.)

Mr. Rudin: I don't want to be technical, but if you would just tell us approximately what period and where?

Mr. Hoppe: Yes.

Q. At what time was this, Mrs. Schultz?

A. This was in 1949.

Q. And what area did you cover with your plugging, what geographical area?

A. San Francisco and Hollywood.

Q. And where did you take Plaintiff's Exhibit 7 for identification, in San Francisco? [39]

A. I went to the Black Hawk cafe or night club.

Q. This was in 1949?

A. This was in 1949.

Q. And that was in what city, San Francisco?

A. San Francisco.

Q. What did you do with Plaintiff's Exhibit 7 for identification there?

A. I took it to the Eastman Trio.

Q. And what did they do with it?

A. They played it several times.

Q. Where else did you take Plaintiff's Exhibit 7 for identification, in 1949?

A. To the Hangover Club.

Q. In what city is the Hangover Club?

A. San Francisco.

Q. And what did you do with Plaintiff's Exhibit 7 for identification at the Hangover Club?

A. I left it with a man called Doc Evans and



(Testimony of Mildred Becker Schultz.)

His Chicagoans. They were appearing there at the time.

Q. And what did they do with it?

A. I have no idea, sir, because he was going to look it over and let me know, and when I went back for it, he was gone.

Q. And where else did you take Plaintiff's Exhibit 7 for identification? [40]

A. To Edgewater, out at the Beach, to Lionel Hampton.

Q. Was that in San Francisco?

A. Yes, sir; it was.

Q. And who is Lionel Hampton?

A. He is a big orchestra leader.

Q. And what did you do with Plaintiff's Exhibit 7 with Lionel Hampton?

A. Well, I gave it to him and he told me he turned it over to his arranger.

Mr. Rudin: Just a moment. Your Honor, I move to strike that from the record. That would call for actions or conversations outside of the presence of any of the defendants.

The Court: She said she gave it to him. I will let that remain.

Mr. Rudin: That part, yes.

The Court: All right.

Mr. Rudin: But what he said he would do, I move to strike.

The Court: Yes; that part may go out.

Mr. Rudin: Thank you, your Honor.

(Testimony of Mildred Becker Schultz.)

Q. (By Mr. Hoppe): And where else did you take Plaintiff's Exhibit 7 for identification?

A. I took it to Walt Norbriega.

Mr. Rudin: How do you spell that? [41]

A. The first name is Walt (W-a-l-t). The last name is N-o-r-b-r-i-e-g-a, I believe.

Q. (By Mr. Hoppe): And who was Walt Norbriega?

A. Well, he had a small orchestra in the Palace Hotel.

Q. In San Francisco?

A. In San Francisco.

Q. And what did he do with it?

A. He told me to take it up and give it to Jack——

Q. No. What did he do with it?

A. He played it before the people.

Q. Were there any other places in San Francisco where you took Plaintiff's Exhibit 7 for identification?

A. Yes; I took it to the Fairmont Hotel, to the Cirque Room.

Q. And this was in 1949? A. Yes, sir.

Q. And what did you do with it at the Cirque Room? A. I turned it over to Jack Ross.

Q. And who is Jack Ross?

A. Well, he has an orchestra playing in the Cirque Room.

Q. And what did Jack Ross do with it?

A. Well, I was told that he——

(Testimony of Mildred Becker Schultz.)

Q. No. Just what you know. Not what somebody told you.

A. He took my music and wanted to play it for the boys.

Q. Do you know whether he did play it for the boys? [42]

The Witness: He told me that——

Mr. Ruiz: I object to that, being told.

Q. (By Mr. Hoppe): Do you know whether he did or not? A. I didn't see him do it.

Q. To who else did you take Plaintiff's Exhibit 7 for identification?

A. Well, I know that The Vagabonds came out to see me about it.

Q. The Vagabonds?

A. Yes. Pete Peterson, I believe, his name is.

Q. What is The Vagabonds?

A. Well, they are a small performing orchestra.

Q. And what did they do with the sheet music?

A. I don't know, sir, but I just never got it back.

Q. Are there any places outside of the San Francisco area where you took Plaintiff's Exhibit 7 for identification?

A. Yes, sir; there is. I took it to Hollywood.

Q. And where did you take it in Hollywood?

A. To one place was the RCA Victor Building.

Q. The RCA Victor Building? A. Yes.

Q. And where did you take it to at the RCA Victor Building? Was this in 1949?

A. This was in 1949.

(Testimony of Mildred Becker Schultz.)

Q. Where did you take it in the RCA Victor Building? [43]

A. To a girl behind either a counter or a desk.

Q. Do you know whose office that was?

A. I believe it was a reception area of the building.

Q. And what company was it?

A. It was RCA Victor.

Q. What did you do with it there?

A. I gave it to the girl, and she said she would see if she could do something about it, and I left it with her.

Mr. Wolff: I object and move to strike out what she said.

The Court: Yes; that may go out. I will sustain the objection and that may go out.

Mr. Hoppe: Mrs. Schultz, you can't testify as to what people told you except if they are one of the defendants here.

The Witness: I see.

Mr. Hoppe: It is just what you did physically that I would like to bring out.

Q. Now, did you give her the sheet music?

A. Yes, sir.

Q. And did you get it back from her?

A. No, sir; I didn't; I don't know for sure, because somebody sent it back to me with no return address on it.

Q. Oh, somebody sent back to you the piece of sheet music that you gave to this girl? [44]

(Testimony of Mildred Becker Schultz.)

A. I don't know whether it was her or somebody else that I gave it to in Hollywood.

Q. Now, who else did you take the sheet music to in Hollywood?

A. To an arranger. I don't know the name of the street.

Q. What was his name?

A. I don't know, sir.

Q. How did you happen to go to that arranger?

A. I saw the name "Arranging" in front of the house, so I went in.

Q. Now, is there anyone else that you can recall in the Hollywood area that you took the sheet music to?

A. I took it to Maxine Andrews.

Q. Maxine Andrews?

A. Andrews, of the Andrews Sisters.

Q. Is that the same one you were talking about before?

A. Yes, sir.

Q. And what did she do with the piece of sheet music?

A. She kept it until 4:00 o'clock in the afternoon.

Q. And what did she do with it at 4:00 o'clock in the afternoon?

A. Her secretary or some woman in the office handed it back to me.

Q. What time of the day did you give it to her?

A. I am not sure, sir. [45]

Q. But you do recall that you got it back at about 4:00 o'clock in the afternoon?

A. I had an appointment to meet her at 4:00.

(Testimony of Mildred Becker Schultz.)

Q. Were there any other people in the Hollywood area to whom you handed Plaintiff's Exhibit 7?

A. Yes, sir; some recording company or some music publisher on Santa Monica Boulevard.

Q. Do you remember the name of it?

A. No, sir; I don't.

Q. And what did you do at this concern on Santa Monica?

A. I handed it to a girl working there.

Q. And what did the girl do with it?

A. I don't know, sir.

Q. Did you get it back?

A. I don't know which one sent it back to me.

Q. Oh, you don't? I am not trying to lead the witness. You don't know whether it was the RCA Victor Music you got it back from or the Santa Monica Boulevard people that sent it back?

A. I don't know which one it was. There was no return address on the envelope.

Q. Are there any other addresses in the Hollywood area where you took this piece of music? You mentioned the RCA Building, an arranger in Hollywood whose name you did not recall, Maxine Andrews and somebody at the Santa Monica [46] building.

A. I did take it to another arranger, but I don't remember the period of time that I did it.

Q. Were there any other places that you can recall where you took Plaintiff's Exhibit 7 for identification?

A. In San Francisco again.

(Testimony of Mildred Becker Schultz.)

Q. If you can, would you name some more in San Francisco, then?

A. I took it up to The Say When Club, to Billy Eckstein.

Q. Who is Billy Eckstein?

A. He is a singer.

Q. And what did Billy Eckstein do with the piece of music?

A. He looked it over and sang it to himself.

Q. And was there anybody else that you took Plaintiff's Exhibit 7 to?

A. Yes; I took it to a small colored band, I believe the name was Bunny Peterson.

Q. And where was Bunny Peterson located?

A. Over on Fillmore Street.

Q. In San Francisco? A. Yes, sir.

Q. What did he do with Plaintiff's Exhibit 7?

A. Well, he rehearsed it with his orchestra. He was going to make me a demo recording. [47]

Q. Were there any other places where you took Plaintiff's Exhibit?

A. Yes, sir; to Leo Killion.

Q. Who is Leo Killion?

A. I believe he is the man who wrote the Hut-Sut Song.

Q. And what did he do with it?

A. Well, he is the man who told me to get the——

Mr. Ruiz: Just a moment. I object to that.

Q. (By Mr. Hoppe): What did he do with it?

A. I don't know whether he kept a copy or not.

(Testimony of Mildred Becker Schultz.)

Q. After you took it to Mr. Leo Killion, what did you do with it?

A. Oh, I did have a small college musician that was going to try to cut me a demonstration record.

Q. Now, Mrs. Schultz, can you think of any other places?

A. I don't think so, sir, at this moment.

Q. Now, what was the first time you heard either "Blacksmith Blues" or "Happy Pay Day"?

A. I was working out in front of my house.

Q. When was this?

A. This, I believe, would be the summer of 1952.

Q. And would you please state the circumstances of that, now that we have the time and place?

A. I was out in front of my house working in the garden when my phone rang and I was called in the house and I was told [48] by——

Mr. Wolff: Objection, your Honor.

The Court: As to what she was told, yes, I will sustain the objection as to what she was told. She can't tell us that.

Mr. Hoppe: Your Honor, I don't think that this testimony will be objectionable on the basis of hearsay, because it is really a verbal act, and I think that after the testimony is heard there will be no objection to it, but I would rather have it brought out and then have it stricken if it is not admissible.

Mr. Wolff: Your Honor, he is attempting to put in testimony as to what opinion that witness had. I know what the testimony is.



(Testimony of Mildred Becker Schultz.)

The Court: I will let the ruling stand. I will sustain the objection, Mr. Hoppe.

Q. (By Mr. Hoppe): When was the first time you heard "The Blacksmith Blues," Mrs. Schultz?

A. When it came over the television on Sid Caesar's program, with the Hamilton Trio dancing to it.

Q. In what year was this?

A. I believe it was 1952.

Q. The summer of '52?

A. The summer of '52.

Q. Had you ever heard it before that time? [49]

A. No, sir.

Q. After hearing the song on the TV, what did you do?

A. I drove down to the grocery store and bought a copy of it, and I looked at the music.

Q. And what did you conclude?

A. I concluded that it was my own music.

Q. What did you then do?

A. I immediately—I can't say immediately—I believe this was on a Saturday—as soon as I possibly could, within a matter of a day or two, I went to Mr. Paul McCarthy, the City Attorney from Belmont, and showed him the music and asked him if he would help me with it; and he in turn sent me up to Mr. George B. White, a patent attorney in San Francisco.

Q. And George White is the attorney who filed the suit for you in the first place, up in San Francisco?

A. I don't believe he filed it.

(Testimony of Mildred Becker Schultz.)

Q. Oh, he didn't file the suit? A. No.

Q. Do you know whether George White advised any of the defendants of the infringement?

A. Yes, sir; he did.

Mr. Hoppe: Now, your Honor, before releasing her for cross-examination, I would like to play "The Blacksmith Blues" record and have her show points of similarity between [50] this record and her copyrighted music. We have a record player here.

The Court: You want to do that now?

Mr. Hoppe: Yes, sir.

The Witness: The "On" switch is on the front and you have to push a button down below in front, underneath the dial; you have to push it to the left.

(The recording was played.)

Mr. Rudin: This is one of the exhibits?

Mr. Hoppe: Yes. I will identify it in just a minute.

Mr. Rudin: That is Plaintiff's Exhibit 11. That is the Ella Mae Morse record.

Mr. Hoppe: That is the Ella Mae Morse record. This was Plaintiff's Exhibit 11, your Honor, that we are playing now.

(Recording played.)

Q. Now, Plaintiff's Exhibit 11, you have just heard that. Would you please sing from your piece the part of the melody that you believe is on Plaintiff's Exhibit 11?

(Testimony of Mildred Becker Schultz.)

A. (Singing): "Workin' for—Workin' for the Army down in ol' Ken-tuck-y"—

Do you want me to go on?

Mr. Rudin: Yes, please.

Mr. Hoppe: Yes, go ahead.

The Witness: Well, I never know what I was singing—— [51]

Mr. Hoppe: Go ahead.

The Witness (Singing): "Workin' for the Army, down in ol' Ken-tuck-y, hot sparks a-fly-in', Waitin' for My Baby," it's all the way through it, every other bar, it's to me my own.

Q. (By Mr. Hoppe): Now, Plaintiff's Exhibit 10, which is "Happy Pay Day," I want to play that now.

(Said recording was played.)

Now, in Plaintiff's Exhibit 10, would you please hum the part of the tune there that you believe is in your copyrighted music?

A. Well, it is the same as "Blacksmith Blues," only it is slurred just a little.

Q. Would you——

A. "Workin' for the Army, slav-in' for the Ar-my, waitin' for my baby, don't say maybe"—

Mr. Hoppe: Now, we have Plaintiff's Exhibit 9, which is "Happy Pay Off Day," and I would like to have you listen to that and point out to the court where you think the similarity is. Listen to this first.

(Recording played.)

(Testimony of Mildred Becker Schultz.)

Q. (By Mr. Hoppe): Now, would you hum from your piece of music that you think is in common between Plaintiff's Exhibit 9 and your music? This (indicating) is Plaintiff's Exhibit 9. [52]

A. "Workin' for the Army, slavin' for the Army, let's go find a Parson, to change your name to Carson, think it over, Baby, please don't say maybe."

Mr. Hoppe: You may cross-examine.

The Court: Should we start at 2:00 o'clock, Mr. Rudin?

Mr. Rudin: It is all right with me.

The Court: Make it 2:00 o'clock.

Mr. Hoppe: Thank you, your Honor.

Mr. Rudin: Your Honor, what is your usual practice as to adjourning time?

The Court: We run to about 4:00 o'clock. We run until 4:00 unless there is some witness that is trying to get away on an airplane.

Mr. Rudin: Thank you.

(And, thereupon, a recess was taken until 2:00 o'clock p.m. of the same day, Tuesday, September 17, 1957.) [53]

Tuesday, September 17, 1957—2:00 P.M.

Mr. Hoppe: May it please the court, I have finished my direct of Mrs. Schultz.

The Court: That is right.

Mr. Hoppe: But I forgot to offer Exhibits 6 and 7 for identification.

The Court: All right. They may be received.

Mr. Rudin: That is subject to our same objections, your Honor.

The Court: Yes. I will overrule the objection.

### MILDRED BECKER SCHULTZ

the plaintiff herein, having been previously duly sworn, resumed the stand and testified further as follows:

The Court: She is ready for cross-examination. He has finished the direct examination. Mr. Ruiz, do you want to lead off?

Mr. Ruiz: Thank you, sir.

#### Cross-Examination

By Mr. Ruiz:

Q. Mrs. Schultz, I understand that from the year 1941 up until the year 1952, you sent through the mails only one time either one of the songs that you referred to here as "Good Old Army" and "Waitin' for My Baby," is that correct?

A. All that I could recall at this moment is that I [54] sent it to the Schumann Music Company.

Q. That was the only one?

A. No. Until '52. I may have mailed it to Paul Barraet of Sky Streak Record Company: I am not sure.

Q. But you are not sure of that. And with respect to the musical composition which you sent to Schumann Music Company, which was it, was it "Good Old Army" or was it "Waitin' for My

(Testimony of Mildred Becker Schultz.)

Baby"? A. That was "Good Old Army."

Q. And it is true, is it not, that that was mailed back to you? A. Yes; it was.

Q. And on the envelope there appeared the word "Refused"? A. Yes, sir.

Q. That is all. Now, is it correct, is it a fair statement to state all other persons you knew of who received copies of either one of those songs were given copies by you, personally?

A. Yes, sir.

Q. Is it my further understanding and would it be a fair statement to state that you made no recordings whatsoever?

A. Do you mean, sir, records?

Q. Records?

A. I am trying to think back. I have another song and I [55] recorded that one. I am trying to think if I recorded this one.

Q. Well, wasn't your testimony this morning to the effect that you attempted to have one of these or these recorded but that there were no recordings made? A. That is right.

Q. Do you have any recollection of ever personally meeting Jack Holmes?

A. I have never been formally introduced to the man, so, therefore, I don't know whether I ever met him.

Q. Then, your answer is that you have no recollection of ever having met Mr. Jack Holmes?

A. Not under that name.

(Testimony of Mildred Becker Schultz.)

Q. Have you ever met Mr. Jack Holmes under any other name, to your knowledge?

A. I don't know who the gentleman is, sir, so I don't know whether I met him or not.

Q. Very well. Now, I think you stated that you first thought up the melody when you were walking down the street?

A. I was walking uptown, if my memory is correct.

Q. And you were just walking along?

A. I was walking uptown with my girl friend and I thought it up after I had met our friend. That is the first time I ever thought of it.

Q. Well, were you walking along when you originated it, or was it after you met your friend?

A. It was after—I met the friend half way uptown and after we left him, that is when it came to me, while I was walking.

Q. While you were walking. By the way, you have never published either one of these songs—you have never copyrighted either one of them as a published item, these musical compositions?

A. I don't have published copyrights. I have unpublished copyrights.

Q. Unpublished copyrights. Now, as you were walking, did you give the song that you originated at that time a tempo of a march or a walking song?

A. Let's say it's a march with a beat.

Q. You mean a syncopated walk?

A. A syncopated walk.

(Testimony of Mildred Becker Schultz.)

Q. And this musical composition can be played as a waltz, can it not?

A. No, sir. It is not in three-quarter type.

Q. You have heard it played as a waltz, haven't you?

A. I have heard it played as a waltz, yes, but it is not written as a waltz.

Q. And you have heard it played as a rumba?

A. That is right.

Q. And you heard the same sequence of notes played in [57] Dixieland style as well, have you not?

A. May I ask you what you mean, sir, by Dixieland style?

Q. Did you know any Dixieland band?

A. Yes, I did. I met Doc Evans and His Chicagoans with the Dixieland band.

Q. And you gave him the music, did you not?

A. Yes; I did.

Q. Did you ever hear it played as Dixieland music?

A. Not by him.

Q. By anybody else?

A. At this moment, sir, I can't recall exactly a Dixieland—well, I have written it—it can be played as a Dixieland beat, but I don't know; my impression of Dixieland is improvisation on all parts of the instruments. Is that what you mean?

Q. I don't know. I was just wondering what your interpretation was, Mrs. Schultz.

A. Well, to me a Dixieland band is one where everybody jumps in on the theme, and if that is



(Testimony of Mildred Becker Schultz.)

what you mean, I have never heard it played that way.

Q. Now, do you claim origination in this musical composition with respect to the sequence of notes, irrespective of style that it may be played?

A. Well, I don't know if you mean, sir, that I originated the key of E or G. [58]

Q. No; I am not talking about key. I am talking about the sequence of notes, the theme of the song, about what you have been referring to?

Mr. Hoppe: May it please the court, I object to the question, because her contention of the breadth of the copyright doesn't have anything to do with the lawsuit. It is a question for the court to decide.

The Court: I will overrule the objection.

Mr. Ruiz: Will the reporter read the question, please?

(Pending question read by the reporter.)

Q. Is that where the origination or the originality of it, of this particular melody is?

A. I don't know what you mean, sir. Did I originate this one particular bar that you are talking about, the sequence of notes?

Q. Now, you have been talking about one particular bar all the time, haven't you?

A. Yes.

Q. And when you sang from the witness stand, you sang four different bars, did you not?

A. I sang I believe the same music but different words.

(Testimony of Mildred Becker Schultz.)

Q. In other words, you repeated one bar four different times, is that not correct?

A. Musically, yes.

Q. Musically you repeated one bar. Now, how many notes [59] does that bar contain?

The Witness: Well, I——

Q. (By Mr. Ruiz, continuing): Will you please look at the exhibit and tell us how many notes that this original bar contains, and I am showing you Plaintiff's Exhibit 2 entitled "Good Old Army" and Plaintiff's Exhibit 5 entitled "Waitin' for My Baby"? Give us the number of notes in this particular bar.

A. There are six notes.

Q. There are six notes? A. And a rest.

Q. There are six notes and a rest?

A. And a rest.

Q. All right. Therein lies the originality of your musical composition?

A. Yes, sir.

Q. Do you know how many bars there are in "Blacksmith Blues"?

A. At this moment, I think there are 16 bars of the main theme.

Q. And 16 bars more, besides the bars of the main theme?

A. No, sir. There is an introduction in it that I don't believe has anything to do with the main theme, but I believe there are 16 bars of the main theme.

Q. Now, getting back to these seven notes, I believe you [60] stated that those are the notes that you played as originality.

(Testimony of Mildred Becker Schultz.)

Mr. Hoppe: Six notes.

Q. (By Mr. Ruiz, continuing): Six notes. I am sorry.

The Witness: Six notes.

Q. (By Mr. Ruiz): Will you hum those six notes for me, please? A. (Humming.)

Q. Like "Old Black Joe" (humming), do you mean, is that it? A. No, sir.

Q. You know "Old Black Joe," do you not?

A. I have heard it.

Q. And isn't it true that "Old Black Joe" starts (humming)?

A. (Humming): Isn't it "Gone are the days"? Well, to me it doesn't sound like my song. I may be wrong.

Q. Have you heard any other songs that in their introductory phrases have the same sequence of notes?

A. When you say introductory phrases, are you speaking of the introduction or of the theme of it?

Q. I am thinking and I am speaking of the first bar of a theme?

A. Well, all music is made of certain notes, but I claim my originality on the syncopation. [61]

Q. Now, will you please explain to us what you mean by your original syncopation, Mrs. Schultz?

A. It is the beat of the song. It's a beat with a hop, an after beat on each note, with an accent on the first beat.

Q. You mean some notes have more value than other notes? A. Yes, sir.

(Testimony of Mildred Becker Schultz.)

Q. Is that what you mean? A. Yes.

Q. And is that where your originality lies?

A. My originality lies I believe with the syncopation of this bar and the sequence. It may be used in some other songs that you may find, but I don't think they sound like mine.

Q. Well, you have heard the Marine's Song (humming), the way that starts out?

A. (Humming): Well, that is a pickup.

Q. I am talking about one bar, the introductory bar of the theme; those are the same sequences, are they not, and is that not a syncopation?

A. I don't know. If you could show me a copy of music. It is easy to interpret music, but it is easier to see the way it is written. You can take one piece of music and play it any way you want.

Q. Well, we will give you plenty of opportunity to go into copies, but at the moment we are speaking of melodies, even [62] up to this phase.

Now, have you heard, the question is, other songs use the same sequence as to the introductory phrase or bar of the theme?

A. Well, there must be an awfully lot of them that use the same notes, because there are only so many notes in music.

Mr. Ruiz: No further examination.

Mr. Rudin: Just a moment, your Honor.

Does your Honor have any objection if we split the cross-examination?

The Court: No.

Mr. Rudin: And counsel?

(Testimony of Mildred Becker Schultz.)

Mr. Hoppe: None at all.

**Cross-Examination**

By Mr. Rudin:

Does counsel have any objection if I ask the witness to show me how she was walking at the time the idea of the song came to her?

Mr. Hoppe: I wouldn't have any. Would you mind?

The Court: Do you want her to illustrate?

Mr. Rudin: How she was walking, yes, your Honor.

The Witness: May I say, Mr. Rudin, that was many years ago, and I am a tap dancer and I can go into any beat, but I will give you my best recollection.

Q. (By Mr. Rudin): Well, before you do that, let us understand [63] the circumstances. You were walking with a friend, weren't you?

A. Yes, sir.

Q. Was your friend a tap dancer?

A. No, sir.

Q. You were walking together, were you not?

A. Yes; but I had a habit of practicing tap when I walked.

Q. Were you practicing tap at the time you wrote the song?

A. I was dancing along, sir.

Q. Oh, you weren't walking; you were dancing?

A. Well, let's say I was walking with a light beat.

(Testimony of Mildred Becker Schultz.)

Q. Will you show us what you mean by walking with a light beat?

A. It is kind of hard for me to recall. (The witness demonstrates.)

Q. That is how you were walking along the street at the time? A. Yes, sir.

Q. Isn't that rather unusual, to be walking that way? A. I guess I am an unusual character.

The Court: You will have to turn around. I couldn't hear you. When you answered that, you were facing Mr. Rudin and I couldn't hear your answer.

The Witness: Mr. Rudin said—what did you say, sir? [64]

The Court: "Unusual."

The Witness: "Unusual."

Mr. Rudin: I asked isn't that rather unusual, to walk that way?

A. Well, I stated that I am an unusual character and like to walk like that.

Q. And that is how the beat came to you?

A. Yes, sir.

Q. Is that a rather common tap dance beat?

A. No. That is walking with a heel and a toe.

Q. You have done that for many years, haven't you, in your routines?

A. Well, it's part of tap dancing. I mean, there are many steps in tap dancing and different beats, but I find that by being conscious of my heel and my toe that it helps me with my tap.

Q. Well, was that a routine that you had de-

(Testimony of Mildred Becker Schultz.)

veloped in your tap dancing, that you had used before?

A. No, sir. It is just a walk with a beat you will find—well, it is going a little bit into detail.

Q. Well, let us go into detail. Was it a beat that you ever used in dancing before?

A. I am trying to think. I believe it is used in the Continental, which is a tap dance.

Q. Have you ever done the Continental as a performer? A. Yes, sir; I have.

Q. Prior to 1941 have you seen other people do it? A. The Continental?

Q. Yes. A. You mean the tap dance?

Q. Yes.

A. The Continental is a tap dance which was created, I believe, by a Mr. McLean, that I studied from, and it's a dance within itself and there are various, there are a lot of unusual steps in it.

Q. This sort of thing you showed us, this sort of syncopation or off-step beat was one of the rhythms used in that Continental dance, was it not?

A. Well, I am not sure, sir.

Q. Well, did you ever use that beat in any other routine that you ever did?

A. I have to think back too many years ago to remember what routines I did do and what steps I used.

Q. Try to think back, Mrs. Schultz.

A. Well, I have to think of the music I could have used. I don't know offhand if it is a standard step.

(Testimony of Mildred Becker Schultz.)

Q. My question is not whether it is a standard step, Mrs. Schultz. My question was as to this particular beat that you were doing, that particular walk insofar as your tap dancing, as I understood it, whether you had ever [66] danced to such a beat?

A. Well, I don't know, sir. I know that is the way I walked uptown that day.

Q. Well, how would you think, did you just walk that way but you didn't dance that way?

A. Well, when you have a rhythm in your mind, you will dance or walk according to the rhythm in your mind.

Q. I see. Was this rhythm in your mind the first time that rhythm had ever been in your mind, that day?

A. Yes, sir. This song, when it was created, the uttermost thing in my mind was "I love it," and then as I walked along then it was born.

Q. Did you walk along or did you dance along? Let us clarify that phase of it.

A. A person actually doesn't dance up the street, but they may walk in rhythm.

Q. And this rhythm was something that you had never used before in any dance routine?

A. I don't know whether—I think there is a step in the Continental where you take it into a break. I am not sure.

Q. Now, that step in the Continental is where some music had been written for that particular Continental dance?



(Testimony of Mildred Becker Schultz.)

A. Yes; it is the Continental. As a matter of fact, it's [67] a slap on in front.

Q. Pardon me?

A. I am sorry. I am talking tap dancing words.

Q. That is all right. I would like to have you repeat the words.

A. I am trying to think of the opening of this Continental. I know it has got numerous steps in it and they are all variations and I am trying to remember exactly where I used that step.

Q. In other words, the music Continental is played with various rhythmic variations as part of this Continental dance routine which your teacher had devised, is that correct?

A. It has many variations in it and you don't always—sometimes you will dance against the rhythms; you break them up and syncopate them yourself. I am trying to think back to that Continental. I know that—can I give you—well, maybe you don't want me to dance in court.

Q. Pardon me.

A. Maybe you don't want me to dance in court. I was going to give you a demonstration.

Mr. Rudin: I have no objection.

The Court: That is all right. Dance, if you want to.

The Witness: Is that all right?

The Court: Yes. [68]

The Witness: I want to give you an idea of what a tap dancer will do with music. Now, this is a

(Testimony of Mildred Becker Schultz.)

step that is broken up in all different rhythms, but it actually doesn't follow the music.

(The witness dances.)

I mean that music can't follow every beat. You break up and syncopate the beats to the music.

Mr. Rudin: I see.

Q. Now, in connection with this little walk, would you do that again, that you were doing at the time you wrote it?

A. (The witness illustrates.)

Q. Isn't that a rather common dance routine, to see someone come on the stage that way (illustrating)?

A. I guess it is.

Q. That sort of a beat and where someone comes on the stage that way, at the beginning of a ball? Resume the stand, Mrs. Schultz. When somebody comes on the floor with that kind of step and comes on the stage with sort of a limp or a tilt to them, isn't there usually music played in accompaniment with it?

A. Isn't there usually a vamp, an introduction when you come out like that?

Q. Yes. It could be any sort of a piece of music written to bring on that tilting step, isn't that true?

A. Sometimes they go (humming), then you come out, or [69] you can come slap-on.

Q. In other words, depending on how the man comes on the stage, it is a rather common entree for a dancer or other performer to come on the

(Testimony of Mildred Becker Schultz.)

stage, not just walk on the stage as though he were out to be running for Governor but to come on the stage with a step to get the audience livened up, they come out with a syncopated walk or something of that kind?

A. Did you ask me a question?

Q. Yes, isn't it usual for a performer to come out on the stage with a syncopated walk similar to the one you just did?

A. I have seen them come out with every type of step there is.

Q. Including the one you just did?

A. I think so, sir.

Q. And you have heard music to the accompaniment of that type of step, have you not?

A. I don't recall at this moment whether I have heard the exact music that would fit that step.

Q. Now, did you testify that you wrote this as sort of an Army song?      A. Yes, I did.

Q. Do you recall the sort of step you did, this loping thing, walking beat? [70]

A. I would say it would be walk with a bounce.

Q. A walk with bounce. It is not really a walking beat?      A. Well——

Q. It is not a marching song either?

A. No, but I have noticed since that the Army counts off almost in the same style.

Q. You have since, but we are talking about 1941.      A. Yes.

Q. When you wrote the song, did you write it as a walking song?

(Testimony of Mildred Becker Schultz.)

A. All I know is that I was walking when I wrote it and my feet carried along in the same beat.

Q. What I am getting at is, did you write the song with the rhythm in mind for people to walk to it or for people to sort of run along and syncopate?

A. Syncopation.

Q. It is not a walking song, then, is it?

A. No, but the accent is on the on-beat.

Mr. Rudin: Counsel, do you have the original deposition of the plaintiff?

Mr. Hoppe: The court reporter has it here.

Mr. Rudin: Will you give it to the witness. This was taken on March 1, 1955.

Mr. Hoppe: Would you refer to the page, Mr. Rudin?

Mr. Rudin: Yes, I will, counsel. Thank you. [71]

Q. I would like to direct your attention, Mrs. Schultz, to your testimony on page 17, the question on line 13 and the answer on line 15. The question is:

“With respect to the melody itself, it did not come to you all at once, did it?”

And your answer was:

“As I walked I hummed it to myself. It’s a walking song, has a walking beat.”

Did you so testify on that day, Mrs. Schultz?

A. Yes, sir.

Q. Now, do you desire to change your testimony and say that it does not have a walking beat, it has a dancing beat?

A. I don’t know if I said it had a dancing beat,

(Testimony of Mildred Becker Schultz.)

I don't know if I testified that way. I say it is a walk with a bounce.

Q. That is not a walking beat, walking with a bounce, people don't walk with a bounce?

A. Some people do.

Q. People combine the dance and walk, isn't that correct?

A. The majority of people may walk straight, but there are some people who do walk with a bounce.

Mr. Hoppe: Pardon me a moment. I don't think it makes any difference, your Honor, what language we use for this beat. It is written down. Some people might call it a walk, some people might call it a bounce, some people [72] might call it anything, but I think the important thing is what it is, rather than what this witness calls it, and I object to any further testimony along the line as to what name we are going to give this particular beat.

Mr. Rudin: We have had two important concessions from his witness as to the plaintiff's claim and no direct answer, and on cross-examination this witness testified that her claim to originality was to the syncopation. I think our whole position will be to show that if there is any similarity at all in these compositions it is in the forenotes and the forenotes are somewhat different than the forenotes in "The Blacksmith Blues," being a common syncopation beat, and I want to find out. If this witness testified that she wrote a walking song, I want

(Testimony of Mildred Becker Schultz.)

to know where the beat came into it, and I think it is proper evidence for cross-examination.

The Court: I will overrule the objection.

Q. (By Mr. Rudin): Now, you know musical terms, Mrs. Schultz, don't you; you have been around dancers and entertainers, and a walking beat has a very definite connotation in music, does it not?

The Witness: I don't know what you mean by that. What was the word you used?

Mr. Rudin: Walking beat. [73]

The Witness: No. What did you say?

Mr. Rudin: Connotation, common meaning, people call it, when they describe something in musical terms in the entertainment field. Does it not?

Let me phrase the question this way:

Suppose an entertainer came around to do a bounce performance and there was an orchestra there and the orchestra leader didn't have the kind of music he wanted and in trying to tell him what type of music he wants for his routine, said, "When I come on with my partner, my straight man, give me a walking beat," the orchestra leader would know what he meant by a walking beat, would he not?

A. Yes, that would be a straight 1, 2, 3, 4, but if he walked with a bounce, it would be 1, 2-3, 4.

Q. Then he would say "Give me a walking bounce"?

A. He would say "Cut time" I believe is the phrase.

(Testimony of Mildred Becker Schultz.)

Q. He would say "Cut time," but he wouldn't say "Give me a walking beat," would he?

A. I think he would say a 4-4.

Q. Now, you have heard those records played. The one of Ella Mae Morse, Plaintiff's Exhibit 11, does that have a walking beat to it?

A. It doesn't have a walking beat. It has the beat that I use. [74]

Mr. Rudin: I move to strike the last part of the answer.

The Court: Yes, it may go out. It may go out.

Q. (By Mr. Rudin): Now, this music you sent to Schumann Music Publishing Company, that came back, the envelope came back unopened, did it not?

A. Yes, sir.

Q. Do you have that here in court?

A. I believe Mr. Hoppe has it, sir.

Mr. Hoppe: Yes, we have it here in court.

Q. (By Mr. Rudin): And that is the only time you submitted the music to any music company that you know of, is that correct?

A. At this time that is my best recollection.

Q. By mail? A. By mail.

Q. Now, this envelope is opened, Mrs. Schultz; it wasn't returned to you opened, was it?

A. No. It had a clip on the back. It was clip-closed.

Q. And it was returned in that manner?

A. Yes, sir.

(Testimony of Mildred Becker Schultz.)

Mr. Rudin: May I have this marked as Defendants' Exhibit A, for identification?

The Clerk: A.

The Court: Yes, A. [75]

(Said envelope was marked as Defendants' Exhibit A, for identification.)

Q. (By Mr. Rudin): Did I understand you, Mrs. Schultz, to say that your song written by you, the "Good Old Army" had the accent on the on-beat?

A. Well, I have to look and see, sir. I may be a little confused.

Q. Yes, please. Which copy of your song do you want?

A. There is more time value to the on-beat than there is to the off-beat.

Mr. Rudin: Do you have a copy here of Plaintiff's Exhibit 2?

Mr. Hoppe: You have Plaintiff's Exhibit 2, I think, don't you (addressing the witness)?

Mr. Rudin: This isn't 2.

Mr. Hoppe: Here is 2. The witness has Exhibits 2 and 5.

Mr. Rudin: I am sorry, counsel, if this is 2. Your Honor, I am a little concerned. This is not what was exhibited to us as 2, because 2 is what was purported to have attached the Copyright Deposit stamp and described as such.

Mr. Hoppe: It has been misnumbered.



(Testimony of Mildred Becker Schultz.)

Mr. Rudin: I am afraid it has been incorrectly marked.

Mr. Hoppe: No. 2 is the one that is in the Complaint. 2 is the one that is in the Complaint. [76]

Mr. Rudin: That is where the confusion came in.

The Clerk: Yes.

Mr. Rudin: May this be withdrawn? It is really the same as 3.

Mr. Hoppe: Where did you get that?

Mr. Rudin: May we have permission to take the exhibit directly from the Complaint and use it?

The Court: Yes.

Mr. Hoppe: It has already been given a number.

Mr. Rudin: Oh, I am sorry.

Mr. Hoppe: Just take it right out. This is 2 (indicating) and this is 5.

Q. (By Mr. Rudin): Now, you say that the accent is on the on-beat. Could you designate the note and mark it, if you would, with this red ball point pen, also as to where, what you consider the on-beat?

A. Well, this has half time more value on the on-beat, the first beat.

Q. That is the very first note?

A. Yes, the first note. There is a dot after it and that gives you a little more time.

Q. And that would be a C?

A. That would be a C. And this here (indicating) has a tail on it, so it takes a half away from here and the same follows through, there is a dot after the E (indicating) [77] and there is a tail on the

(Testimony of Mildred Becker Schultz.)

next E, so this (indicating) is time and a half more than this (indicating) time, and this here (indicating) is I believe an eighth and that takes away from here (indicating) and ties a half time more on the G.

Q. And as I understand, then, basically in your first measure there in "Workin' for the Army," you have six notes and as to the first two notes they both are C? A. Yes.

Q. And they are not equal notes except half of the time is taken from the second note and placed on the first note? A. That is right, sir.

Q. And as to the third and fourth notes, they are again sort of a couplet, being the note E——

A. Yes.

Q. ——and again half of the time is taken from the second E and put on to the first E?

A. The time is taken away from the second and put on the first.

Q. And put on the first E?

A. That is right.

Q. In other words, in the same manner as the first two notes? A. That is right.

Q. And the last two notes of the measure, there being six [78] notes in the measure, are an F and a G? A. Yes.

Q. And this time the time is taken away from the first two notes and put onto the last one?

A. It is taken on to the back of the G, the last note.

Q. Now, you have wrote music before, haven't you? A. Yes.

(Testimony of Mildred Becker Schultz.)

Q. Isn't that a rather common occurrence in music, to have six notes like that with the time value going onto the first note?

A. Well, that is one way of writing music.

Q. It is one way of writing it syncopated, is it not?

A. That is right, but it depends on where the dot is, to give the time value.

Q. All right. In other words, if you had four quarter notes——

A. Yes.

Q. ——you would have a straight beat there?

A. 1, 2, 3, 4.

Q. That is right.

A. Or you can break time and get two eighths (humming).

The Court: A little louder.

(The witness hums.)

The Court: Go right ahead.

Q. (By Mr. Rudin): Now, isn't this type of breaking up the [79] notes something you have seen before in musical literature?

A. It has to be. Music can only be written in one way.

Mr. Rudin: I see.

The Witness: Here is your song (indicating), sir.

Mr. Rudin: Thank you.

Q. As I understood your testimony, the first time you heard the song "The Blacksmith Blues" was about in the summer of 1952?

(Testimony of Mildred Becker Schultz.)

A. I presume so.

Q. And it was in connection with Sid Caesar's program? A. Yes, sir.

Q. And what time of day was it?

A. I don't know. It was in the afternoon sometime. I was working outside. I had no idea exactly what time it was.

Q. And prior to that time you had never heard the song before? A. No, sir.

Q. What type of a dance step were they doing to it?

A. A bounce. They were wearing jeans, the Hamilton Trio.

Q. Was it a common sort of a bounce?

A. Well, they have a style of their own, I mean being a dancer and observing their type of music and dancing, I would say that it would fit them. I don't know if I can explain. I mean they do dance differently than most dancers. [80]

Q. Did the music fit their dance?

A. Yes, sir.

Q. They were dancing their step with the music?

A. Yes, sir.

Q. Was the music played as "The Blacksmith Blues" is ordinarily played?

A. I can't recall at this time, sir.

Mr. Rudin: No further questions.

The Court: Mr. Wolff, any questions?

Mr. Wolff: No, sir.

The Court: Mr. Ruiz, any questions?

Mr. Ruiz: No further questions.

(Testimony of Mildred Becker Schultz.)

The Court: Do you have some more, Mr. Hoppe?

Mr. Hoppe: Just a few on redirect, your Honor.

The Court: Certainly.

### Redirect Examination

By Mr. Hoppe:

Q. Now, Mrs. Schultz, one of the last questions that Mr. Ruiz asked you had to do with the fact that you had heard the same notes before as the introductory portion to a song. Do you recall that question?

The Witness: Well, do you remember how he phrased it, sir?

Mr. Hoppe: Would you, Mr. Reporter, read the last question that Mr. Ruiz asked on cross-examination?

(Record read by the reporter.)

Q. Now, by that do you mean that you had known the same [81] sequence of six notes in an introductory bar to a song before?

A. No, sir, I can't recall that I know any exact song that is used the same way.

Q. And when you were examined about the fact that you thought that your syncopation was original, were you disclaiming any originality in the sequence of notes or in the value to the notes?

The Witness: Can you ask me that again, sir?

Q. (By Mr. Hoppe): When you say that the syncopation was new, were you endeavoring to tell us that you didn't think that the combination of notes was new?

(Testimony of Mildred Becker Schultz.)

Mr. Rudin: I object to the question, your Honor, as leading and suggestive and argumentative.

The Court: It is, but I will overrule the objection. You may answer.

A. I don't know exactly how to answer that. I know that it was new to me, if that is what you mean.

Q. (By Mr. Hoppe): And what about the value of the notes?

A. I can't think of any song offhand that has the same, exact syncopation.

Q. And what about the values of the little tails and all that on the notes? I don't know anything about music, you understand.

A. Well, all music is written in time value, and you [82] cannot write music without having to use the same breaking up of notes. There is only one way of writing music. You can't invent a new way. There is a dotted eighth, there is a sixteenth note, there is a quarter note, a half note, and all music must use the time values somewhere in their music, or else there is no music.

Q. Now, looking at the whole thing as a unit, that is the syncopation as you call it, and the particular order of the notes and the value of the notes, have you seen that before?

A. No, sir, I have not.

Q. Now, are there any other similarities that you noted between your music and "The Blacksmith Blues" or "Happy Pay Off Day," other than the

(Testimony of Mildred Becker Schultz.)

sequence in the six notes and the syncopation and the values?

A. Well, in my opinion, it follows the same theme, because where I have "Breakin' My Back," they got horse "shoes"—I mean they follow the same theme and then it jumps back into the first bar again.

Mr. Hoppe: That is all.

### Recross-Examination

By Mr. Ruiz:

Q. Mrs. Schultz, are you claiming originality to the beat or are you claiming originality to the sequence of notes?

A. I am claiming originality to the sequence of notes with [83] the beat.

The Court: Both, she says.

Mr. Hoppe: Both.

A. I did not originate an E or a G or an A.

Q. (By Mr. Ruiz): In other words, the beat is what you have referred to from the witness stand as "1 and 2 and 3," etc.?

A. Not exactly that way, sir.

Q. Well, that is what I heard, now. In what way?

A. Well, the sequence with the syncopation I am claiming.

Q. Then, you don't claim this "1 and 2" and bounce has any part of any originality in so far as these six notes are concerned involved in this lawsuit?

(Testimony of Mildred Becker Schultz.)

A. Well, I haven't checked all music, but there must be some place in music where there is a dotted eighth and a sixteenth note.

Q. Is that the "1 and 2 and"—

A. Well, it is not exactly that way. It's a series of syncopation that creates an effect. I am claiming that I originated the effect. I don't know if I make myself clear, sir.

Q. Please continue, because I am trying to understand it, Mrs. Schultz.

A. Well, if I may speak, music is music. It is a hard [84] subject to define.

Q. Yes.

A. It is made up of a series of notes and syncopation and you can play the same song a dozen different ways but you cannot change the theme.

Q. Well now, does this syncopation that you are speaking of continue all the way through your song?

A. No, sir. It doesn't.

Q. It only appears in one bar?

A. No, sir. It appears—it is repeated in two bars and then it comes, I think—I am not sure now without looking at the music—that there is a two-bar break, then it comes back to the original again and then it is repeated.

Q. But it is the same four or five or six notes, isn't it?

A. Not all—the syncopation may be changed a little bit to fit the words, but it sounds the same.

Q. And what we are speaking about here is one bar, is that not true, that is repeated?



(Testimony of Mildred Becker Schultz.)

A. Yes, sir.

Q. And this particular syncopation and theme in this particular one bar is repeated on two occasions throughout the entire song, is it not?

A. Which one are you speaking of now, the Blues?

Q. Well, we will say in "Waitin' for My Baby."

A. I believe in "Waitin' for My Baby" it is repeated six [85] times.

Q. But it is the one bar?

A. Well, in music, again, it is like writing a book; the main theme is what comes to your ear; you build a bridge, you get away from it, but you always come back to your main theme.

Q. That is what they call the structure?

A. That is the structure of your song. You build around your structure, so you accent your main theme.

Q. And in this particular song the theme is contained in one bar?

A. No, sir. It is in two bars—six bars.

Q. All right now, aren't those bars repetitious? That is what I want to find out.

A. Yes.

Mr. Ruiz: They are. Very well.

The Court: We might stop at this time and take the afternoon recess, Mr. Ruiz.

Mr. Ruiz: Yes.

(Recess.)

The Court: Go ahead.

Q. (By Mr. Ruiz): (Playing notes on violin.)

(Testimony of Mildred Becker Schultz.)

I believe it is your testimony that you claim your originality, Mrs. Schultz, is in the combination of the notes and the beat to create an effect, is that correct? [86]

The Witness: Would you repeat it, sir?

Mr. Ruiz: Mr. Reporter, would you read the question?

(Pending question read by the reporter.)

A. Yes, sir.

Q. And it's in the sequence of notes that go like this, is it not true?

(Mr. Ruiz plays notes on violin.)

A. No. It isn't.

Q. All right now, will you repeat just what it is?

A. You didn't play it properly, sir.

Q. Pardon?

A. You didn't play it properly.

The Court: She said you didn't play it properly.

(Mr. Ruiz plays notes on violin.)

A. No. That is an a-natural in there.

Q. That is the one that is in the other song?

A. The A is naturalized there instead of flat. May I ask what key you are playing that in there, sir, so I will know what I am talking about?

Q. And is that natural note in "The Blacksmith Blues"? A. Is the A natural?

Q. (Mr. Ruiz plays notes on violin.) Is that in "The Blacksmith Blues"?

(Testimony of Mildred Becker Schultz.)

A. Yes, the a-natural is in "The Blacksmith Blues."

Q. All right. In yours it doesn't have that, does it? [87] A. No; it hasn't.

Q. So with respect to the six notes we are talking about, one of the notes is different in "The Blacksmith Blues" from the note that you are referring to in "Good Old Army"?

A. It is the same note, sir, but played a little higher.

Q. It is the same note only it isn't?

A. It is the same note, but there is a difference between sharp and flat. An A is an A.

Q. Very well. Then it is a note with a different tone?

A. It would still strike A, but it would be a little higher on the A.

Q. That is correct. You don't have that little note that is a little higher in your six notes, do you?

A. No, I don't.

Q. In your six notes it is the same one, isn't it?

A. In my song it is written in the key of E-flat.

Q. Well, irrespective of what key it may be in or whether it is A or whether it is G, irrespective of the key, now I am trying to get the tone sequence, and the question is, in your particular song, it is the same note instead of a natural?

A. It's a flat instead of a natural.

Q. Well, would it be (playing notes on violin).

A. In which song, sir?

Q. In the Army song? [88]

(Testimony of Mildred Becker Schultz.)

The Witness: Now, would you play it again?

(Mr. Ruiz plays notes on violin.)

A. Well, that would be either a-flat or a-natural; or no—it wouldn't be—yes, it is, a-flat.

Q. (By Mr. Ruiz): All right. Those are the same notes, aren't they?

The Witness: Would you play the different song? Well, I am not asking questions.

Mr. Hoppe: Why don't you ask her to sing it? I think she can do it easier.

Q. (By Mr. Ruiz): (Playing on violin.) The first two notes are the same, are they not?

A. Yes.

Q. (Playing notes on violin.) The next two notes are the same? A. Yes.

Q. And what are the next two notes, then?

A. An A and a B.

Q. All right. Now, you sing the six notes.

(Playing notes on violin.)

A. (Singing.) "Workin' for The Army"—

Q. (Playing notes on violin.) Is that it?

A. You haven't got the right—could you try it on the piano, Mr. Ruiz? It is a little hard on the violin.

Q. (Playing notes on violin.) [89]

A. That is closer to an a-flat.

Q. Is that yours?

A. Yes, it is closer to it, but it isn't it exactly.

(Testimony of Mildred Becker Schultz.)

Q. Well, I will try to read it again (Mr. Ruiz plays notes on violin).

A. That's mine only your B is flat.

Q. That is yours, is it? A. Yes.

Q. Is that correct? A. Yes.

Q. Now, how does the other one go?

A. Play it the same way, only move your third finger a half note higher.

Q. (Mr. Ruiz plays notes on violin.)

A. No. That is way up.

(Mr. Ruiz plays notes on violin.)

The Witness: Now you got it.

Q. (By Mr. Ruiz): All right now, we got the differentiation. (Playing notes on violin.) That is one, isn't it?

A. Well, if we are getting technical, the third note was a little off.

Q. All right. I am trying my best to try to hit it. I will try it again (playing notes on violin). Is that close enough?

A. Now I am mixed up. I am sorry, sir. [90]

Q. Now, with respect to the beat——

A. Yes:

Q. ——and the combination, it's a long one, a short one, (playing notes on violin), is that the swing (playing notes on violin), is that the beat you are talking about?

A. Yes, only it is a little fast (humming).

Q. Now, that is the beat that you claim originality to, isn't it (humming), is that it?

(Testimony of Mildred Becker Schultz.)

A. Well, that is original with me.

Q. All right. Now, have you ever heard this song before (playing on violin)?

A. Yes; I believe I did.

Q. (Playing violin.) Have you ever heard that song before?

A. It seems to me it goes—I believe I heard it. That isn't "Camp Town," is it?

Q. No. That is an old German folk song, a Schuhplattler song; have you ever heard that tempo played exactly the same way before? Have you ever heard it before, that is the question?

A. It sounds familiar to me.

Q. Now, if it is the same as your particular beat, would you still claim you originated that particular beat?

A. Well, I don't know what is in the other song, but I know that mine came to me—— [91]

Q. While you were walking?

A. ——while I was walking.

Q. That is why you claim it is original, because it came to you while you were walking, in that particular fashion?      A. That's right.

Mr. Ruiz: That is all.

Mr. Rudin: Will the clerk mark this. Your Honor, I have an old piece of paper here, but I am only introducing it, counsel, for the last three bars.

Mr. Hoppe: What is this?

Mr. Rudin: Just forget what is on top of this.

Mr. Hoppe: What is it?

Mr. Rudin: Just three bars of music.

(Testimony of Mildred Becker Schultz.)

Mr. Hoppe: Well, what is it?

Mr. Rudin: I will identify it. I just want it marked for identification.

Mr. Hoppe: Oh, all right.

The Court: Defendants' Exhibit B.

The Clerk: Defendants' Exhibit B marked.

(Said document was marked as Defendants' Exhibit B for identification.)

Q. (By Mr. Rudin): Mrs. Schultz, I direct your attention to the last three lines here, and I am going to ask Mr. Wolff to play something on the piano and I want you to tell me if in your opinion he is correctly playing what is [92] notated here?

The Witness: You mean these three lines is what he is going to play?

Mr. Rudin: That is right.

(Mr. Wolff plays piano.)

A. On this b-natural here it didn't sound proper.

(Mr. Wolff plays on piano.)

The Witness: That is a flat, isn't it, B-flat?

(Mr. Wolff plays on piano.)

Mr. Rudin: Would you like him to play it again?

The Witness: Would you, please?

(Mr. Wolff plays on piano.)

The Witness: I am lost because you hit the F sharp.

(Testimony of Mildred Becker Schultz.)

Could you take it from the last four bars, Mr. Wolff?

(Mr. Wolff plays on piano.)

A. Well, it sounded like it, excepting the last F, it didn't sound like an F.

Mr. Rudin: The bar, Mr. Wolff.

(Mr. Wolff plays on piano.)

Mr. Wolff: That is an F natural there; there is no sharp.

(Mr. Wolff plays on piano.)

A. It sounds like it to me.

Q. (By Mr. Rudin): That seems to be correct?

A. Yes. [93]

Q. Does the music sound at all familiar to you, aside from the syncopation of the beat?

A. It's just running around a scale. It doesn't strike any—I don't remember it.

Q. It doesn't sound at all familiar to you?

A. I don't know what it is unless it is a syncopation changed on some other song I should know.

Mr. Rudin: Well, would you try to play that with a little syncopation, Mr. Wolff?

(Mr. Wolff plays piano.)

The Witness: It's changing the syncopation, isn't it?

Q. (By Mr. Rudin): Well, the syncopation—the same notes, isn't it? A. Yes.

Q. Does that sound familiar to you?



(Testimony of Mildred Becker Schultz.)

A. It does.

Q. What does it sound like?

A. It sounds something like "The Blacksmith Blues."

Q. Something like it?           A. Yes.

Mr. Rudin: May we have this marked in evidence, your Honor.

The Court: Yes.

Mr. Hoppe: Well, no, not in evidence, because we don't know what it is. [94]

Mr. Rudin: It is just some music, your Honor.

The Court: Yes, I will let it be received. I will overrule the objection, on the statement of counsel.

Mr. Rudin: B.

The Clerk: B in evidence.

The Court: B in evidence.

Mr. Rudin: It is just for the purpose of identifying her testimony.

(Said document was received in evidence and marked as Defendants' Exhibit B.)

Mr. Rudin: No further questions. Thank you.

The Court: Does Mr. Hoppe have any further question?

Mr. Hoppe: Yes.

The Court: You don't want Mr. Wolff at the piano any more?

Mr. Rudin: No, no. That was one of his qualifications when he came to our office, your Honor; he had to play a piano.

(Testimony of Mildred Becker Schultz.)

### Redirect Examination

By Mr. Hoppe:

Q. Mrs. Schultz, with reference to the envelope which was marked Exhibit A, which I believe you testified was the only thing that you could recall which you sent in the mails, do you know of your own knowledge whether—you said it was closed when you received it? A. Yes, sir. [95]

Q. Do you know the envelope had been opened or not between the time you mailed it and the time you received it? A. I do not know, sir.

Mr. Hoppe: You do not know.

Mr. Rudin: May I consult with counsel for just one moment?

The Court: Yes.

Mr. Rudin: It might save some time.

(Intermission.)

Q. (By Mr. Hoppe): Did you receive other things in the mail that pertained to your music?

A. Yes, sir.

Q. And did you call my attention, Mrs. Schultz, during the recess to Plaintiff's Exhibit 12 for identification, which is a Publishing Agreement and Royalty Contract form dated May 29th, 1942, between Mildred Becker and Westmore Publishing Corporation, but not signed by you, and Plaintiff's Exhibit 13, which is the carbon copy of Exhibit 12 for identification, and Plaintiff's Exhibit 14, which is a letter from Stephen M. Janik to you, and Plain-

(Testimony of Mildred Becker Schultz.)

tiff's Exhibit 15, which is a letter dated November 2, 1949, from Lou Levy to you?      A. Yes.

Q. Did you ever show your music to Westmore Music [96] Corporation?

A. No, sir. I never heard of it.

Q. Did you ever show your music to Stephen Janik?

A. I don't even know who the gentleman is.

Q. And did you ever show your music to Lou Levy?      A. Yes, sir. I gave it to him.

Q. Who is Mr. Levy?

A. I presume that he is Maxine Andrews' husband.

Q. Do you know who he is?

A. Yes, I do know who he is.

Q. And who is he?

A. He is Maxine Andrews' husband.

Q. And did you receive all of these enclosures in the mails?      A. Yes, sir; I did.

Mr. Hoppe: We offer in evidence, your Honor, Plaintiff's Exhibits 12, 13, 14 and 15.

Mr. Rudin: There's no possible relevance to any of the issues in this case. At the time the contract was given, maybe they wanted some money to publish her song. The letter from Levy has nothing to do with the issue. Mr. Levy is not a defendant. Mr. Levy, whoever he may be, is not a defendant.

Mr. Ruiz: I object to them on the grounds they are immaterial and irrelevant. [97]

Mr. Rudin: It merely shows a submission to Leads Music Corporation. It was rejected. She

(Testimony of Mildred Becker Schultz.)

doesn't know these other people. The publishing agreement was never signed.

The Court: I will let them speak for themselves. I will overrule the objection. Let them be received.

Mr. Hoppe: Thank you, your Honor.

The Clerk: Twelve, 13, 14 and 15 in evidence.

(Said documents, so offered and received in evidence, were marked as Plaintiff's Exhibits 12, 13, 14 and 15.)

Mr. Hoppe: No further examination.

The Witness: Am I free?

Mr. Hoppe: That is all.

The Court: Yes. You may step down.

Mr. Hoppe: Your Honor, the plaintiff rests.

(Whereupon, the Plaintiff rested her case in chief.)

Mr. Rudin: Your Honor, may we have just one moment to confer?

The Court: Certainly.

(A short intermission.)

Mr. Ruiz: If the Court please, the defendants that I represent will call as their first witness Mr. George G. Schneider.

The Court: Mr. Schneider. [98]

GEORGE G. SCHNEIDER

called as a witness herein on behalf of certain defendants, being first duly sworn, testified as follows:

The Clerk: Please state your name for the record.

A. George G. Schneider.

Direct Examination

By Mr. Ruiz:

Q. What is your name, sir?

A. George G. Schneider.

Q. What is your occupation?

A. Music research.

Q. How long have you been engaged in that occupation? A. Approximately 30 years.

Q. Does that include the study of music and its sources? A. Pardon me?

Q. Does that include the study of music and its sources? A. It does.

Q. Do you hold any degrees from any institutions? A. I do.

Q. And what degrees do you hold?

A. Bachelor of Arts.

Q. Bachelor of Arts. Do you have any honorary degrees?

A. Honorary Doctor of Music.

Q. And from what university is that?

A. Berlin, the University of Berlin.

Q. Have you studied extensively, music? [99]

A. I have.

Q. Do you play any instruments?

(Testimony of George G. Schneider.)

A. I have.

Q. In connection with your studies?

A. Yes, sir.

Q. Will you please say those instruments?

A. Piano, organ, trumpet.

Q. Have you ever prepared any studies, theses, have you ever prepared any writings in connection with music?

A. Only for school papers and library journals.

Q. Have you ever been engaged by motion picture companies in connection with the music work that they do?

A. I have.

Q. And will you please name them?

A. Metro-Goldwyn-Mayer Studios, for 27½ years.

Q. Have you ever been employed by Paramount Studios?

A. Only in a plagiarism case.

Q. In the plagiarism field?

A. Yes, sir.

Q. Have you ever testified in court before?

A. No, sir.

The Witness: Will you excuse me, please, your Honor. I just got new dentures.

The Court: That is all right.

The Witness: Please excuse me. I have to press them down [100] every once in awhile. I am sorry.

Q. (By Mr. Ruiz): I will show you some sheet music and ask you if you have ever seen this sheet music before?

A. I have.

Q. Did you prepare it?

A. I had it prepared.

Q. Under your supervision?

(Testimony of George G. Schneider.)

A. Yes, sir.

Q. And will you state for purposes of the record what it is?

A. It is what we call a comparison chart of the thematic material.

Q. Of the thematic material of "Happy Pay Off Day"?

A. And "The Blacksmith Blues," "Good Old Army" and "Waitin' for My Baby."

Mr. Ruiz: May I have this marked as the first exhibits for defendant Tune Towne Tunes and the clients that I represent, for identification?

Mr. Rudin: Your Honor, why don't we just call it Exhibit C?

Mr. Hoppe: Why don't we just follow right along?

The Court: Very well.

The Clerk: That will be Defendants' Exhibit C.

(Said document was marked as Defendants' Exhibit C, for identification.) [101]

Q. (By Mr. Ruiz): In connection with this exhibit being, would you say, a comparative analysis of those four musical compositions?

A. I would, of the thematic material of the four musical compositions.

Q. Now, what is thematic material?

A. It is usually considered the melodic line.

Q. The melodic line?           A. Yes, sir.

Q. Now, does the thematic material that you have compiled contain the entire musical composi-

(Testimony of George G. Schneider.)

tions from beginning to end insofar as the chorus is concerned of the four musical compositions that you have made reference to?

A. With the exception of the last eight bars of "Waitin' for My Baby," and I did not have access to it, but since this was compiled I am satisfied that we have sufficient from the introduction, in other words, the last eight bars of "Waitin' for My Baby" are primarily the same as the first eight bars. Otherwise, we have all of the material of the choruses.

Q. We have some records. Now, I am going to play for you Plaintiff's Exhibit 10, entitled "Happy Pay Day," by Sonny Burke and His Orchestra, all the way through, but inasmuch as it is from a record I wish you would [102] indicate to me when it has gone through the entire chorus from the beginning of the chorus to the end as you have depicted it in this comparative analysis? Will you kindly do that for me?

(Said record was played.)

(The witness snaps his fingers.)

Very well.

Now, I notice that you snapped your fingers and I will stop it now and will you indicate what you meant by the snap of fingers?

A. He interpolated something.

Q. And that was strange to anything that appears in any of the songs, inclusive of—



(Testimony of George G. Schneider.)

A. Yes, sir; up to that point.

Q. And that is something that is different, inclusive of the Army Song and "Waitin' for My Baby"?      A. That is right, yes, sir.

Q. All right now, I will do the same thing to "The Blacksmith Blues," being Plaintiff's Exhibit 11.

(Said record was played.)

(The witness waves his left hand.)

Mr. Ruiz: Very well.

Q. Now, what has been played on this record is what you have in its entirety there with respect to "The Blacksmith Blues" in your comparative analysis, is that correct?

A. There is more on the record up to the point that I [103] stopped you, there was the introduction that I do not have here.

Q. You do not have the introduction?

A. No, sir.

Q. Insofar as the chorus is concerned, it is all there, is that correct?      A. Yes, sir.

Q. Now, for your comparative analysis did you examine Plaintiff's Exhibit 2 in evidence, which is Exhibit 1 in the First Amended Complaint of the plaintiff in the action, and, likewise, place the notes with the values as therein set forth and in the sequence and beat therein depicted and make it a part of your comparative analysis?

A. I never saw this copy, sir, nor a facsimile

(Testimony of George G. Schneider.)

of the lead sheet with the lyrics. I had a full piano part.

Q. You had a full piano part of which, of Exhibit 2 that I am referring to here?

A. Of this exhibit, of this (indicating).

Q. Yes.

A. It has been exhibited—it has been entered.

Q. Now I am showing you Plaintiff's Exhibit 3 in evidence, which is called "Good Old Army," by Mildred Becker of Redwood City, California, and ask you if you have ever seen that piano copy?

A. I have seen a facsimile of it, sir. [104]

Q. And by facsimile you mean the same copy——

A. Yes, sir.

Q. ——only reprinted?                      A. Yes, sir.

Q. Now, I will ask you the question, is that the song you copied there in this work that you have prepared——

A. It is, sir.

Q. ——by way of comparative analysis?

A. Yes, sir.

Q. And it is note for note, it is the same piece, in other words?                      A. Yes, sir.

Q. Very well. I will call your attention to Exhibit 8 in evidence, being Exhibit 2 in the Complaint, "The Blacksmith Blues," recorded by Ella Mae Morse, and ask you if you have seen this musical composition before?                      A. I have.

Q. And I will ask you the question if in your comparative analysis you have likewise set that forth, note by note as it is written on that sheet music by way of exhibit in this courtroom?

(Testimony of George G. Schneider.)

A. I have.

Q. Very well. Now, I think we have one more, "Waitin' for My Baby."

Mr. Wolff: 5 and 6. [105]

Mr. Ruiz: 5 and 6. Thank you.

Q. Now, I will call your attention to Exhibits for plaintiff, respectively 5 and 6, and ask if you likewise copied those from this matter that you compared and prepared by way of comparative analysis?

A. I have never seen (indicating)——

Q. Referring to Exhibit 5.

A. I have never seen that one (indicating). I have a photostatic copy of that (indicating), and I have used that (indicating).

Q. Referring to Plaintiff's Exhibit 6, is that correct?

A. Correct, with the exception of the last eight bars which I did not have on my copy.

Q. And those are the eight bars that you just made reference to a little while ago?

A. Yes, sir.

Q. Very well. Now please tell us what you have done there?

A. I have noted the four compositions and to the best of my ability have tried to put the corresponding notes beneath each other irrespective of their time values and have drawn lines indicating where there is a definite similarity and where there is a definite dissimilarity.

The similarities are noted by the broken line be-

(Testimony of George G. Schneider.)

tween "The Blacksmith Blues" and "Good Old Army."

The dissimilarities are noted by the solid line between [106] "The Blacksmith Blues" and "Good Old Army" throughout the four pages.

Q. Now, for purposes of the record, will you please indicate how many bars there are in the chorus to "Good Old Army"?

A. In the published——

Mr. Ruiz: In——

The Witness: As I have it here?

Q. (By Mr. Ruiz): As you have it here.

A. 32 bars.

Q. I see. And how many bars are there in "Waitin' for My Baby"?

A. "Waitin' for My Baby" also?

Q. Yes, sir.

A. "Waitin' for My Baby" is really a 16-bar repeated.

Q. Repeated? A. Or a 32-bar chorus.

Q. A 32-bar chorus. And how many bars are there in "The Blacksmith Blues"?

A. "The Blacksmith Blues" is a 16-bar chorus repeated.

Q. 32 bars altogether? A. 32 bars.

Q. And how many bars are there in "Happy Pay Off Day"?

A. "Happy Pay Off Day" or "Happy Pay Day"—I copied "Happy Pay Off Day"—[107]

Q. Yes.

A. —has an additional 2 bars at the end of

(Testimony of George G. Schneider.)

the original 16 and also at the end of the composition, so that in reality we would have 36 bars altogether. However, those 2 bars might be considered lead-in notes just the same as in "Waitin' for My Baby" and we have 2 notes leading into the chorus that are not figured as part of the chorus.

Q. Now, in the 32 bars of "The Blacksmith Blues" and the 32 bars of "Good Old Army" and the 32 bars of "Waitin' for My Baby," in your comparative analysis how many notes did you find to be the same notes with respect to sequence?

A. In the first bar of the two compositions, out of the six notes that we have in "Good Old Army," there is one that is not in "The Blacksmith Blues"; in other words, our fifth note in "Good Old Army" is A-flat, whereas, in "The Blacksmith Blues" it is an A-natural.

In the second bar, it's 50-50. The second bar of "Good Old Army" is practically a repetition, practically a repetition of the first bar; whereas, the second bar of "The Blacksmith Blues," there is a decided variation.

Q. Now, will you continue with the bars thereafter, so that we may have this down?

A. In bar 3 there are only two notes that are the same and yet they are different in that they are octaves.

In bar 4 we have transitions, so that we could say [108] there is one note that is the same in both compositions.

In bar 5, no comparison; in bar 6, no compari-

(Testimony of George G. Schneider.)

son; in bar 7, no comparison; in bar 8, no comparison; and then for our next eight bars we have practically a repetition of the same thing.

Q. Now, did you hear Mr. Wolff play the piano?

A. Yes; I did.

Q. Did you recognize what he played?

A. I did.

Q. What did he play?

A. It's an old, very old trumpet exercise. It isn't Charlier, but it's something like that. A man wrote a "tutor" for various instruments, exercises for the development of the embouchure and also for rhythm.

Q. And was that exercise note for note practically "The Blacksmith Blues"?

A. It was so reminiscent that I don't want to say yes; I don't want to say no.

Q. Well, now, reminiscent, I don't know what you mean by that?

Mr. Rudin: The last three bars.

Mr. Ruiz: The last three?

The Witness: The last three.

The first 4 bars are definitely note for note.

Q. (By Mr. Ruiz): The first four bars are definitely note [109] for note? A. Yes.

Q. Of what song?

A. "The Blacksmith Blues."

Q. And what is the name of the song that you have made reference to?

A. It was not a song.

Q. The musical exercise?

(Testimony of George G. Schneider.)

A. It was an exercise.

Q. And what is the name of it?

A. Something like "Charlier," C-h-a-r-l-i-e-r.

Mr. Rudin: C-h-a-r-l-i-e-r.

Mr. Ruiz: Theo. Charlier?

A. That is it. Theodore.

Q. Theodore. Now, "Good Old Army" or "Waitin' for My Baby," do either one of those songs follow the sequence of notes that you have just made reference to as contained in the first four bars of that musical exercise?

A. No. They don't.

Q. I will show you another piece of paper that has some musical notes on it and ask you if you have ever seen that before?

A. I have.

Q. Was that prepared by you?

A. It was. [110]

Mr. Ruiz: And under your supervision.

I would like to have this marked for purposes of identification as the next letter of the defendants.

The Clerk: Defendants' Exhibit D marked.

(Said document was marked as Defendants' Exhibit D for identification.)

Q. (By Mr. Ruiz): Now, will you please state what this represents?

A. This is a comparative chart showing sources of melodic theme of "Good Old Army," all taken from public domain sources.

Q. And how many public domain sources did you find in that chart that you have prepared?

(Testimony of George G. Schneider.)

A. I put down eleven. That is all I had room for on the page.

Mr. Ruiz: At this time I would like to offer into evidence Defendants' Exhibit C and Defendants' Exhibit D, respectively.

The Court: All right. They may be received.

Mr. Hoppe: Your Honor, they are being received in evidence for the limited purpose of illustrating his testimony?

The Court: That is right.

Mr. Hoppe: Rather than proving the facts?

The Court: That is right. [111]

(Said documents were received in evidence as Defendants' Exhibits C and D, respectively.)

The Court: It is 4:00 o'clock now, Mr. Rudin. We might as well adjourn, because they will want to cross-examine him.

Mr. Rudin: Yes.

The Court: Do you gentlemen want to start at 9:30 and run to 12:00, or do you want to start at 10:00 and run to 12:30? I will do it either way you want to. Which is best?

Mr. Ruiz: 10:00 to 12:30 would be best for me.

The Court: What time do you have to be at El Monte, 2:00 o'clock?

Mr. Rudin: 2:00 o'clock.

The Court: You will go right from here, then?

Mr. Rudin: Yes.

The Court: If we run until 12:30, that will give



(Testimony of George G. Schneider.)

you time to get out there? You will take the Freeway out there?

Mr. Rudin: Oh, sure.

The Court: So we will run from 10:00 to 12:30 tomorrow.

Mr. Rudin: Maybe we can get through tomorrow.

The Court: We have to be here anyway. 10:00 o'clock tomorrow and we will run until 12:30. Then there will be no afternoon session; you understand that?

Mr. Hoppe: Yes.

(An adjournment was thereupon taken until the following day, Wednesday, September 18, 1957, at 10:00 a.m.) [112]

Wednesday, September 18, 1957—10:00 A.M.

The Court: Mr. Wolff, I understand Mr. Rudin may not be here?

Mr. Ruiz: Mr. Schneider, will you take the stand, please?

The Clerk: He was sworn yesterday.

The Court: Yes; the witness was on the stand when we adjourned yesterday.

Mr. Ruiz: That is correct.

## GEORGE G. SCHNEIDER

resumed the stand on behalf of defendants and testified further as follows:

## Direct Examination

(Continued)

By Mr. Ruiz:

Q. Mr. Schneider, you were in the courtroom yesterday when Mrs. Schultz stated in substance that the bouncing effect of tonal couplets made up of a dotted eighth and a sixteenth, notes, was an original effect; do you recall that?

A. Yes, sir.

Q. And, by way of illustration, she was interrogated concerning that sequence of time as follows:

(Mr. Ruiz plays violin.)

Can you hear me? A. Yes. [115]

Q. (Mr. Ruiz plays violin): Now, with respect to the research that you have done and predicated upon your experience as a musicologist, can you give us your studied opinion as to whether that effect, that bouncing effect which she described as syncopation is original or is it something that has been in the musical field for some time?

A. It has been in the musical field for hundreds of years.

Q. And by way of illustration I play this particular musical composition. I want you to listen and see if you can tell me what it is? (Mr. Ruiz plays on violin.) Now, have you ever heard that before?

(Testimony of George G. Schneider.)

A. Yes, sir.

Q. Will you please state for the record what it is?

A. It is a composition by Louis Ganne, called "La Czarina," Louis Ganne, a Frenchman, and he took it from the basic melody from an old Bavarian Schuhplattler which is practically the same. The opening bars are the same.

Q. Now, you observed Mrs. Schultz as she walked up and down in the courtroom here, did you not? A. Yes, sir.

Q. I noticed that you stated the "Schuhplattler." What is a Schuhplattler?

A. A shoe dance.

Q. A shoe dance?

A. A shoe dance; that is the simplest definition I can [116] give. Sometimes they are called Peasant Dances.

Q. Now, will you please examine Defendants' Exhibit C, which is the comparative analysis that you have heretofore testified to, and more particularly the notes of the alleged infringing composition, "Happy Pay Off Day," and tell me whether throughout its 32 bars there are any couplets whatsoever?

The Witness: May I ask you to define what you mean by couplet?

Q. (By Mr. Ruiz): Two notes succeeding each other that are on the same tone. I am referring you to "Happy Pay Off Day."

The Witness: Yes, sir.

(Testimony of George G. Schneider.)

Q. (By Mr. Ruiz): Now, will you examine all of the notes on "Happy Pay Off Day" and tell me whether there are any two notes that follow one another in that particular composition?

A. Yes, sir; there are.

Q. How many?

A. In bar 11 and in bar 27 which is a repetition of 11 we have the same repeated phrase.

Q. Now, you are making reference to two notes that are E, is that correct?      A. E-flat, sir..

Q. E-flat? [117]

The Witness: There is a difference between E and E-flat.

Q. (By Mr. Ruiz): And you heard the testimony of Mrs. Schultz to the effect that when you referred to a flat it was in effect the same note, is that true?

A. I did, sir. It is not true.

Q. It is not true. So, out of those 32 bars there is one note that is repeated?      A. Twice.

Mr. Ruiz: Twice. That is all, with respect to that.

Mr. Hoppe: Mr. Ruiz, just to save me a little time, would you have him number bar 11 and number bar 27 in that exhibit?

The Witness: If you please, sir, they are numbered.

Mr. Rudin: They are numbered.

Mr. Hoppe: Oh, yes. I beg your pardon.

Mr. Rudin: Apparently they are all numbered.

Mr. Hoppe: I was not perceptive.

(Testimony of George G. Schneider.)

Q. (By Mr. Ruiz): Do the sequence of notes which appear in the first bar and repeat in the second bar in the introductory phrase to the compositions "Good Old Army" and "Waitin' for My Baby," and I am speaking of the sequence of notes without the bounce, likewise appear in other musical compositions which are in the public domain?

A. Yes, sir.

Q. I am calling your attention to Defendants' Exhibit D, [118] Mr. Schneider, and particularly in the analysis that you have made there, you have referred to that before, have you not?

A. Yes, sir.

Q Did you invite counsel for the plaintiff to your home last night?

A. I invited him to my office, sir.

Q. And was it with respect to having him check the sources concerning this particular analysis that you have made?

A. It was, sir.

Q. And did you have discussions with him concerning those sources?

A. I pointed out to him the sources and we discussed the way I had prepared them.

Q. Now, with respect to the manner in which you have prepared that particular analysis, I notice that what you have placed down there is all in one key, is that correct?

A. It is, sir.

Q. Have you transposed these into one key for any particular purpose?

A Yes, sir.

Q. Will you please state that purpose?

A. For easier reading for non-musicians, for

(Testimony of George G. Schneider.)

purposes of comparison by the placement of the notes; whereas, they [119] might sound the same to the ear played in different keys, they appear better when they are written in the same key. I have not changed the tonality at all, that is, the tonal progression at all.

Q. The sources themselves from which you have repeated in this particular exhibit may be in other keys and are in other keys, are they not?

A. Practically every one of them was, yes, sir.

Q. And, therefore, the changes from the sources are changes that are made of necessity as a consequence of your simply putting them into the same key, is that it? A. That is right, sir.

Q. And, as I understand your testimony to be, that from a listener's point of view the sequence of notes are the same—— A. Correct

Q. ——as the sequence of notes from, I believe you put on top there that you compared it with "Good Old Army"?

A. "Good Old Army," yes, sir.

Q. Very well, sir. Now, will you please go to the piano and show us audibly what you have done there?

A. Do you want me to play them in the original notes or the way I have got them?

Q. No. Pardon me. I will ask you one question:

As far as tones are concerned and sequence of tones, irrespective of what key they may be, since you have placed [120] them all in one key, in substance it is the same thing, isn't it?

(Testimony of George G. Schneider.)

A. Yes, sir.

Mr Ruiz: Very well.

The Witness: Shall I announce the composition?

The Court: Yes. You better do that.

Mr. Ruiz: You can use one finger. It is all right.

The Witness: This is "Good Old Army" (the witness plays piano). The first illustration is an old French drinking song, "Entendez Vous Le Carillon Du Verre" (playing piano).

The next one is Stephen Foster's "Old Black Joe" (witness plays piano).

The next one is from Hymnes of the French Revolution (playing piano).

The next from "Piano Concerta No. 1" (witness plays piano).

The next from Dvorak's "Violin Concerto" (witness plays piano).

The next from Beethoven's "Trio," for clarinet, cello and piano playing (witness plays piano).

The next from "Forellen Quintet," by Schubert (witness plays piano).

The next, "The Marine's Hymn" (witness plays piano).

The next, the source of "The Marine's Hymn," from [121] Genevieve de Brabant, by Offenbach (witness plays piano).

The next is an old German folk song, "Zum Letzten Mal" (the witness plays piano).

The next, by Sievert, "Goldene Burschenzeit" (the witness plays on piano).

(Testimony of George G. Schneider.)

Mr. Ruiz: I think you may resume the stand. You can bring the exhibits with you.

(The witness returned to the witness stand.)

Q. Now, Mr. Schneider, is it your testimony, then——

Mr. Hoppe: Now, let us not lead the witness, Mr. Ruiz.

Q. (By Mr. Ruiz, continuing): ——that in addition to the bouncing effect to which we have heretofore referred, that there is nothing new in the sequence of the notes?

Mr. Hoppe: I object to the leading form of the question, your Honor. That has not been his testimony; and the demonstration on the piano demonstrated conclusively that there was no similarity between the pieces.

The Court: I will overrule the objection.

Mr. Ruiz: Will the reporter read the question?

(Pending question read by the reporter.)

A. It is my testimony there is nothing new in the sequence of the opening phrase of the song.

Q. And when we are referring to "Good Old Army" and "Waitin' for My Baby," we are specifically referring to the opening phrases of the chorus of those songs, are we [122] not?

A. I am, sir.

Mr. Ruiz: That is all.



(Testimony of George G. Schneider.)

Cross-Examination

By Mr. Hoppe:

Q. Now, Mr. Schneider, I would like to examine you first on your chart, which is Defendants' Exhibit D.           A. D.

Q. And bears the Roman numeral III on the top, Exhibit D, and has 12, what do you call those musical scores on it, what is the technical expression of these lines that go across?

A. There are twelve themes.

Q. And it has twelve themes on it. Now, turning to the last part of your testimony, do I understand your testimony to be to the effect that those opening themes in all of those twelve pieces are the same musically?

A. The sequence of notes, the opening notes are the same in all of them, the intervals between the notes, or as we call it, the sequence.

Q. Now, turning to the top theme, which is from "Good Old Army," on the lowest line there appear a note with one tail on it, a dot, and a note with two tails on it. What is that note called, to a musician?

A. The note there is E-flat and the first one is a dotted [123] quarter—a dotted eighth. Excuse me. The second one is a sixteenth.

Q. Now, in the next song, which is the French song, the first note is also on a line and it has no tail on it. To a musician what is that note?

(Testimony of George G. Schneider.)

A. It is E-flat and it is a quarter note.

Q. And on the next one, what is the corresponding note? A. E-flat, a quarter note.

Q. And that same thing would be true, would it not, of the "Piano Concerto," line 5?

A. You skipped one, didn't you, sir?

Q. Well, I want to get all that are the same, to shorten this, Mr. Schneider.

A. Excuse me, please. Yes, sir.

Q. That would be true in line 5, the "Piano Concerto," true in line 6, the "Violin Concerto"; is that true in all E-flats, notes?

A. They are E-flats, quarter notes.

Q. All right, now, in line 4, what is the corresponding note? A. E-flat.

Q. And what size note is that?

A. A half note.

Q. Now, in line 7, which is the "Trio," and line 8, which is the "Forellen Quintet," and in line 11, which is "Zum Letzten," and in line 12, which is the "Goldene [124] Burschenzeit," those are all the same notes, are they not? A. E-flats.

Q. E-flats, and what size notes?

A. Eighth notes.

Q. And in line 9, "The Marine's Hymn," what size note is that? A. A dotted eighth.

Q. E-flat, a dotted eighth note.

Now, so that we can have a common term of lawyer's vocabulary and musician's vocabulary, can you give me a generic expression, I don't care if it is a musician's expression or whatever it is, that

(Testimony of George G. Schneider.)

we can use to define this theme the commonest, in the theme that you played over there? Can we call it the representative theme?

A. A progression, a progression of notes.

Q. All right, let us call it the representative progression of notes, so we will know what we are talking about.

A. That is characteristic of these compositions.

Q. Now, I am going to write this down so that any time that we use the word "representative"—

Mr. Ruiz: If the court please, the attorney said "representative."

Mr. Hoppe: Well, you use any name you want to, Mr. Ruiz.

Mr. Ruiz: Just a moment, please. The witness testified [125] it was a progression of notes.

The Court: All right.

Q. (By Mr. Hoppe): There are different progressions of notes, are there not, Mr. Schneider?

A. Yes, sir.

Q. Would you give a word to this particular progression of notes, so that when you and I speak of this particular progression of notes, we are speaking about the same thing and there is no question about what vocabulary we are using?

A. This particular progression of notes is a triad based on do-mi-sol.

A. Triad based on do-mi-sol. Are there other triads based on do-mi-sol besides this one?

A. No, sir. Do-mi-sol is a basic triad. You can sing do in any key that you want to and then you

(Testimony of George G. Schneider.)

can get your mi from that and your sol from that and then your octave.

Q. All right. Then, if we call this a do-mi-sol triad it would be your testimony that the do-mi-sol triad is common to "Good Old Army" and common to all of these prior art pieces of music to which you called our attention?

A. Basically, yes, sir.

Q. All right. Now, you have a considerable library of music down at your place of business, do you not?

A. I have. [126]

Q. It is one of the most extensive in the United States, is it not?

A. A private library, yes, sir.

Q. Did you make a search in your library for do-mi-sol triads in which the first portion of the triad, the do part had this combination of notes which you have defined as an E-flat, dotted eighth and a sixteenth E-flat; did you make a search to see if you could find such music?

A. Not extensive, sir, no.

Q. Do you know of any now where that combination appears in a do-mi-sol triad?

A. The one that was played, the Mazurka, by Ganne.

Q. Which Mazurka?

A. The one that Mr. Ruiz played on the violin.

Q. That is not on your chart here, is it, Mr. Schneider?

A. No, sir. It is not.

Q. Do you have the music for that, so that we

(Testimony of George G. Schneider.)

can compare that music with this music that is in issue here?

A. I believe I have sufficient, if I can get to the briefcase for a moment.

Q. Yes, if you will, sir.

Mr. Rudin: Where is it? I will get it.

The Witness: The Dictionary of Musical Themes.

Mr. Rudin: Do you want it out of the dictionary, Mr. Schneider? [127]

The Witness: I believe I will get the original source.

Mr. Rudin: The original source. O.K.

The Court: Go right ahead now.

The Witness: This was known as "La Czarina," by Ganne (the witness plays on piano).

Q. (By Mr. Hoppe): Now, you are playing from a book entitled "Dictionary of Musical Themes," copyrighted 1948, page 193, and those are the—— A. G 20 A.

Q. G 20 A. Now, what is the value and the tone of the first note of this do-mi-sol triad?

A. Our E-flat.

Q. Our E-flat, and what size note is it?

A. That is an eighth note with a sixteenth rest.

Q. And is an eighth note with a sixteenth rest. What is the next note?

A. E-flat (the witness plays on piano).

Q. And what size note is it?

A. A sixteenth.

Q. Now, remember, Mr. Schneider, I am not a

(Testimony of George G. Schneider.)

musician, but I notice the first note has one tail and then the second note has three tails on it. Would that make them both a sixteenth? Now, going back we now have an eighth note?

A. An eighth note.

Q. A dotted sixteenth rest. [128]

A. A dotted sixteenth rest and a 1/32nd note.

Q. Now, what is the next size note, the third note?

A. The third note is an eighth note.

Q. An eighth note and what tone is it?

A. G.

Q. It's a G and then you have a rest, do you not, a dotted rest? A. A dotted sixteenth.

Q. A dotted sixteenth, and then you have a 32nd? A. A 32nd.

Q. A 32nd note. Now, the following note is——

A. E-flat.

Q. ——an E-flat. This is note number 5, you say, is an E-flat, and what size note is it, an eighth?

A. An eighth note.

Q. And then there is a dotted rest again?

A. A dotted——

Q. A dotted sixteenth rest?

Mr. Ruiz: Counsel, I don't mean to interrupt the cross-examination, but it seems to be getting down to a question of comparing the music from one book to another.

The Court: I will let him proceed. Go ahead.

Mr. Ruiz: All right.

(Testimony of George G. Schneider.)

Q. (By Mr. Hoppe): All right. We have a 32nd and a dotted [129] E-flat.

Now, turning back to the subject at hand, before you played this piece, are you aware of any do-mi-sol triad other than those on your chart here or any place——

A. Oh, there are many of them, sir.

Q. Just a minute. Wait until my question is concluded.

The Witness: I thought you had, sir.

Q. (By Mr. Hoppe, continuing): ——in which the do part of the triads comprises in this combination specifically an E-flat, a dotted eighth and a sixteenth? Now, you testified that this piece had that. Will you adhere to your answer, or would you like to change your answer?

The Witness: You have asked two different questions.

Q. (By Mr. Hoppe): All right. Let's find out first if you would like to change your answer that that piece of music you just had, had that specific combination of length of notes and rests and all that in the do part of the do-mi-sol triad?

A. It does.

Mr. Rudin: I object to the form of the question, your Honor. I don't have just exactly what portion you are referring to in which you are trying to impeach the witness, as to whether he wants to change his answer. Frankly, I find the question confusing and misleading.

Mr. Ruiz: I will help counsel. I will stipulate

(Testimony of George G. Schneider.)

that [130] the one that he referred to before had a dotted eighth and a sixteenth and when he went to the piano it was a sixteenth and a 32nd, if that is what you are trying to do.

Mr. Hoppe: Now, I want to find out whether the piece of music at the piano had the specific combination of an E-flat, a dotted eighth and an E-flat sixteenth note.

Mr. Ruiz: I will stipulate to that——

Mr. Hoppe: That it does not?

Mr. Ruiz: I believe it did.

Mr. Hoppe: That it did not?

Mr. Rudin: It speaks for itself, your Honor.

Mr. Ruiz: It was a sixteenth and a 32nd, that is it.

Q. (By Mr. Hoppe): Then the answer is no, that the piece of music did not have a combination of an E-flat, dotted eighth and a E-flat sixteenth?

Mr. Ruiz: The stipulation, your Honor, is a sixteenth and a 32nd.

The Court: All right.

Mr. Ruiz: If he wants that in evidence, I will so stipulate.

Mr. Hoppe: May I have the answer from the witness?

The Witness: The way it is printed?

Mr. Hoppe: Yes.

A. It does not have it. The way it is usually played, you couldn't tell whether it was an eighth note or a dotted [131] eighth, whether it was a sixteenth rest or a dotted sixteenth rest.



(Testimony of George G. Schneider.)

Q. (By Mr. Hoppe): Now, do you know of any piece of sheet music having the do-mi-sol triad in which the do part of the triad comprises, as written and as played, both, an E-flat dotted eighth and an E-flat sixteenth note?

A. I do not know offhand, no, sir.

Q. Now, in your exemplars of the do-mi-sol triad, the first one, the "Good Old Army," what are the notes in words that make up the mi part of the triad in "Good Old Army" on the line 1 of your chart, Exhibit D?

A. The third and fourth notes.

Q. And what are the values and the note names for the third and fourth notes on line 1 of Exhibit D?

A. The first note is a G. It is a dotted eighth note.

The second note is a G. It is a sixteenth note.

Q. Now, in a do-mi-sol triad—I am using it as you and I have used it in our examination so far—are you aware of any prior art music in which there appear for the mi part of the triad a specific combination of a G-dotted eighth and a G-sixteenth note?

A. Offhand, I do not.

Q. Now, Mr. Schneider, notes come in various tonal values, for one thing, do they not?

A. Yes, sir. [132]

Q. And they also come in various sizes, don't they, that is, length of note?

A. Yes, sir.

Q. Now, what different sizes do notes come in, each note? Let us take any note; let us take, for

(Testimony of George G. Schneider.)

example, A. Every note has the same number of sizes, doesn't it? A. It could have.

Q. What are the number of sizes that a note has?

A. Well, we have the whole note, which, for your information, is a note without any stem, it is a round note, it is not a solid note, and I have seen that graduated down to a 128th of a whole note.

Q. 1/128th?

A. Whether or not it goes any higher than that, whether it goes to 256th or not, I do not know.

Q. Now, in the music that we have heard played in this lawsuit so far, we have gone from a whole note down to a half—we haven't any whole notes, have we?

A. No, sir. I beg your pardon. We do have whole notes.

Q. We have whole notes?

A. We have whole notes in "Good Old Army" and in "Waitin' for My Baby."

Q. And then we have half notes?

A. We have, in both of them.

Q. And we have quarter notes? [133]

A. We have.

Q. And we have eighth notes?

A. We have.

Q. And we have sixteenth notes?

A. We have.

Q. And we have 1/32nd notes. You played a 1/32nd note over here on the piano. Do you not?

A. Oh, you mean in the exhibits?

(Testimony of George G. Schneider.)

Q. Yes, sir.

A. Yes, sir; yes, sir. Excuse me.

Q. Now, that means that so far we have run into 1, 2, 3, 4, 5, six different sized notes, is that not right? A. So far.

Q. Now, is a  $1/32$ nd note played  $1/32$ nds as long as a whole note; is that what the  $1/32$ nd means?

A. Yes, sir.

Q. Those are time factors? A. Yes, sir.

Q. How long in time is a whole note?

A. That depends upon the speed at which the composition is written. If we take the ordinary march, it is 120 beats to the minute, and that would be 120 for a quarter note.

Q. So the size of a whole note will vary for different compositions? A. Yes, sir. [134]

Q. Now, in making this chart, Defendants' Exhibit D, some of the source material which you used was from books published in 1948 and 1949, is that right? A. Yes, sir.

Q. And in going over this chart at your office yesterday, we noted, as was brought out in your examination, that in each case the prior art theme was transposed for purposes of enabling visual and auditory comparison with "Good Old Army"?

A. Yes, sir.

Q. And we also noted, did we not, that in some instances on the chart the scrivener or whoever prepared the chart had not given the notes the same values as they appeared in the original manuscript?

(Testimony of George G. Schneider.)

A. What we would call mistakes in spelling, musical spelling.

Q. You call them mistakes in spelling?

A. Yes, sir.

Q. That is, in some places it showed a note having one value and it should have had another value?

A. Correct.

Q. And in some places there were rests that were shown that were not shown in the original?

A. Correct.

Q. And in some places there were dots shown that were not [135] shown in the original?

A. But there was no change in the notation at all.

Q. Now, the earliest piece on Exhibit D, which uses the do-mi-sol triad, would be the number 4, the "Ode Pour La Paix" which was from the French Revolution?

A. "Entendez Vous" was before that, sir.

Q. "Entendez Vous," then, would be before that? A. Yes, sir.

Q. When was "Entendez Vous" originally written? A. Before 1800.

Q. Well, the French Resolution was, you remember we looked it up, 1789? A. Yes, sir.

Q. "Entendez Vous" was before then?

A. Yes, sir.

Q. Now, the only piece which you called to our attention in which the do part of the do-mi-sol triad comprises two notes was the piece which you just played on the piano, is that correct?

(Testimony of George G. Schneider.)

A. Yes, sir.

Q. When was that piece of music written?

A. I do not know the exact date, but the man that wrote it died in 1903.

Q. Out side of that piece of music, do you know of any——

The Witness: May I change that, please, [136] sir?

The Court: Yes, sir.

The Witness: 1923.

Mr. Hoppe: 1923.

Q. Now, outside of that piece of music, do you know of any other piece of music having the do-mi-sol triad in which the do part comprises two notes, of any value?

A. I cannot call them by name, but there are other pieces that I know of under the generic term "Schuhplattler."

Q. And that was the song that counsel played back here with a violin?

A. Along the same lines.

Q. Now, how old a piece is that Schuhplattler?

A. In the early 1800's. They are Austrian and Bavarian folk dances.

Q. Now, these various themes that you have shown us here on Exhibit D, did you show those themes to Jack Holmes? A. No, sir.

Q. Did you ever discuss them with Jack Holmes?

A. No, sir.

Q. Did you ever discuss with Jack Holmes the various source materials—— A. No, sir.

(Testimony of George G. Schneider.)

Q. ——— in which that theme might be found?

A. No, sir.

Q. Now, when counsel played the violin here, he plucked [137] the strings, did he not?

A. Yes, sir.

Q. When you pluck the strings, do they all have the same time value to them?

A. It depends on how he plucks them, sir.

Q. Now, when he plucked them, did they have the same length of time?

A. It depends on how he plucks them.

Q. No. When he did pluck them. You heard him pluck them?

A. That has been some time ago since I heard him pluck them, so I would have to ask him to pluck them again to see whether or not they were of the same value.

Q. Now, in plucking on a violin, can you pluck the entire range of time length from a whole note down to a 32nd of a note?

A. Have I?

Q. Can you? A. It can be done, yes, sir.

Q. Do you think that counsel had that skill and was able to do so and did so?

A. I doubt very much if he would be able to play a composition in march tempo and have a 128th note in there some place.

Q. Now, one other thing I would like to ask you about [138] music, and that is that on Exhibit D there appear the figures 4/4, 2/4, C, 3/8, 3/4; what do those figures stand for?

A. They indicate the number of beats to the bar.

(Testimony of George G. Schneider.)

Q. Now, there is also one that is not on here, which I have seen on one of your other charts, which is a C with a line through it. What does that refer to?      A. That also is a time signature.

Q. How many different time signature are there in common usage in the musical art?

A. Any number of them, sir, unlimited.

Q. An unlimited number?      A. Yes, sir.

Q. And in the charts that you have made, you have used the C with a line through it, which is one, the 4/4 which is two, the 2/4 which is three, the C which is four, the 3/4 which is five, and the 3/8 which is six, is that right, six different time signatures?      A. On these charts, yes, sir.

The Court: We might take the morning recess at this time, counsel. We will take the morning recess.

(Recess.)

Mr. Hoppe: Now, Mr. Schneider, the do-mi-fa——

Mr. Rudin: “Do-mi-sol.”

Q. (By Mr. Hoppe): The do-mi-sol triad appears in [139] “The Blacksmith Blues” with the E-flat, dotted eighth and the E-flat sixteenth variation, does it not?      A. Yes, sir.

Q. And it appears several times in “The Blacksmith Blues”?      A. Yes, sir.

Q. Does it appear in “Happy Pay Off Day”?

A. Yes, sir.

Q. And it appears in there several times?

(Testimony of George G. Schneider.)

A. At least twice.

Q. Now, with this same variation which you and I have just discussed, that is, the E-flat, dotted eighth and the E-flat sixteenth? A. Yes, sir.

Q. I am turning now to Exhibit 3, Defendants' Exhibit 3, which is your large chart, what source material did you use for the first line of that "Happy Pay Off Day"?

The Witness: Excuse me. Aren't you referring to C?

Q. (By Mr. Hoppe, continuing): Yes, Exhibit C.

The Witness: Exhibit C?

Mr. Hoppe: Yes.

The Witness: I thought you said 3, Excuse me.

Q. (By Mr. Hoppe, continuing): Exhibit C; what source material did you use for that?

A. A copy of the song.

Mr. Rudin: I object to that line of cross-examination. [140] If counsel is making any contention that Exhibit C improperly reports the music which is already in evidence, let him say so without spending a lot of time going into source material. It is completely unimportant what he copied it from. The question is, is it this music that is involved in this lawsuit? If he says it isn't, let us find out.

Mr. Hoppe: I want to find out myself, sir.

Q. May I see the original from which you copied that?

A. You have a copy of it here in your exhibits. I'll get my original.



(Testimony of George G. Schneider.)

Mr. Rudin: Your Honor, I again object. It is completely unimportant where he copied it from. If it is the music that is involved here, O.K. If it isn't, I don't think counsel is entitled to it. We are only concerned with the music involved in this case.

The Court: We are only concerned with the music involved here.

Mr. Hoppe: Well, it didn't sound like that to me on the record, your Honor, and I want to find out.

The Court: Well, let us let him answer the question, Mr. Rudin.

Mr. Hoppe: We will make much more time, your Honor.

The Witness: Your Honor——

The Court: The witness wants to clear it up. What do [141] you want to say?

The Witness: Yesterday, I was asked to identify all four of these sources from which I made this chart and I did identify all four of them from the exhibits that are already here.

Q. (By Mr. Hoppe): Yes, but you didn't have that record, Exhibit 9, when you made the chart, did you, sir?

A. I didn't have any record as such. I have never used a record.

Q. You used a piece of sheet music?

A. I did, sir.

Q. May I see that piece of sheet music?

A. Excuse me, sir.

(Testimony of George G. Schneider.)

(The witness left the witness stand temporarily and produced a piece of sheet music.)

Mr. Hoppe: Will you mark this, please?

The Clerk: 16.

(Said document was marked as Plaintiff's Exhibit 16, for identification.)

Q. (By Mr. Hoppe): You have just handed me a piece of sheet music entitled "Happy Pay Off Day"? A. I did, sir.

Q. And that was the source material for the first line on the chart, Defendants' Exhibit C?

A. Yes, sir. [142]

Mr. Hoppe: We offer the exhibit in evidence as Plaintiff's Exhibit 16, your Honor.

The Court: All right.

The Clerk: Plaintiff's Exhibit 16 in.

(Said document was received in evidence as Plaintiff's Exhibit 16.)

Q. (By Mr. Hoppe): Now, turning to Exhibit C, if we use the do-re-mi-fa-sol type of music terminology for "Good Old Army," the opening theme would be do-do, mi-mi, fa-sol, would it not?

A. Correct.

Q. And the opening theme for "The Blacksmith Blues" would be do-do, mi-mi, fa-sol, would it not?

A. No, sir.

Q. And for "Happy Pay"—

A. No, sir.

(Testimony of George G. Schneider.)

Q. What would it be?

A. There is a difference on your fifth note. It will be do-do, mi-mi, fe, instead of fa.

Q. Fe?           A. Fe, yes, sir.

Q. Fe-sol?       A. Yes, sir.

Q. And the opening theme for "Happy Pay Off Day" would be do-mi-do-fe-sol, is that right? [143]

A. Correct.

Q. And the 11th bar of "Happy Pay Off Day" would be do-do-re-do-fe——       A. No, sir.

Q. Do-do, re, do——       A. No, sir.

Q. What would it be?

A. You said the 11th bar.

Q. The 11th bar of "Happy Pay Off Day"?

A. It would be do-do-mi-do-fe-sol-sol-do, going into the 12th bar.

Q. Now, do you know of any do-mi-sol triads which are written in 4/4 time which are part of the prior art?

Mr. Rudin: I object to that question, your Honor, on the ground that it leaves an implication that it has to be written in 4/4 time. Otherwise it has no relationship to this and the witness has testified that 4/4, 6/8 is a construction of relationship. On that basis the question is misleading and I object to the form of it, your Honor.

The Court: I will overrule the objection. You may answer.

The Witness: Will you state the question again, please, sir?

(Testimony of George G. Schneider.)

Mr. Hoppe: Will you read the question to the witness, [144] Mr. Reporter?

(Pending question read by the reporter.)

The Witness: Part of the what, sir?

Q. (By Mr. Hoppe): A part of the prior musical art? A. "Old Black Joe."

Q. "Old Black Joe" is in the C; is that 4/4 time? A. Yes, sir; common time.

Q. If you pardon me, again I am trying to find out what this is about, Mr. Witness, but I thought the C with the line through it was 4/4 time?

A. C with the line through it is what we call cut time. As a rule, it corresponds to two beats to the measure rather than four beats to the measure.

Q. And is that cut time the thing the dot at the end of the first musical note gives you, is that part of the cut time? A. No, sir.

Mr. Hoppe: That is all.

### Redirect Examination

By Mr. Ruiz:

Q. Mr. Schneider, Defendants' Exhibit D, I understand, represents the triad sequence, do-mi-sol, "Good Old Army" and other source musical compositions, is that right?

A. Yes, sir; these other compositions are based upon that triad. [145]

Q. Now, counsel on cross-examination has differentiated note values as to each tone of the triad contained on said Exhibit D, has he not?

(Testimony of George G. Schneider.)

A. Yes, sir.

Q. Does the time value of notes in any fashion change their tonal sequence?      A. No, sir.

Q. Exhibit D, does it not, depicts tonal sequence only?      A. Yes, sir.

Q. Now, to point out tempo dissimilarities, without affecting tonal sequence, certain questions have been asked of and concerning Exhibit D, which is a comparative chart between "Good Old Army" and other source material which you played on the piano, is that not true?      A. Correct.

Q. Were we likewise to point time value differences in your comparative chart on Exhibit C where you have delineated the similarity of four notes between "Blacksmith Blues" and "Good Old Army" and "Waitin' for My Baby," is it not a fact that there would be even less similarity than your chart indicates?

A. If we were taking time values?

Q. Yes; there would be less similarity than that chart indicates?

A. There would be, yes. [146]

Q. And there would be substantially less similarity, would there not?      A. Yes, sir.

Mr. Ruiz: You may cross-examine.

Mr. Hoppe: May I approach the witness, your Honor?

The Court: Yes.

(Testimony of George G. Schneider.)

Recross-Examination

By Mr. Hoppe:

Q. On Exhibit 3, if we give the notes their time value, the similarity on the first note would still exist, would it not? A. Correct.

Q. The similarity on the second note would still exist, would it not? A. Yes, sir.

Q. That similarity we have been unable to find in the prior art; is that not so?

A. The syncopation——

Q. The syncopation and the note values?

A. I haven't gone into it to that extent, sir.

Q. But you haven't seen it?

A. I didn't go into it for that.

Q. So you don't know?

A. I cannot answer that.

The Court: A little louder, Mr. Schneider.

The Witness: I cannot answer that. [147]

Q. (By Mr. Hoppe): And you know of no prior art music that has that relationship of tone values and timing such as illustrated in those two notes?

A. At the present time, I do not.

Q. Now, with reference to the third note, there still would be the similarity if we talked about tone values in all of their aspects? A. Yes, sir.

Q. And with respect to the fourth note——

A. Yes, sir.

Q. ——we would have the same?

A. Yes, sir.

(Testimony of George G. Schneider.)

Q. The fifth note, you would still urge that there is a dissimilarity, would you not?

A. Yes, sir, a definite dissimilarity in tone value.

Q. But not in time value?

A. Not in time value.

Q. And on the sixth note, you would still have the same similarity, would you not?

A. Yes, sir. Do you want to finish the book?

Mr. Hoppe: No. I just want to go that far.

The Witness: Excuse me.

Mr. Hoppe: That is all.

### Redirect Examination

By Mr. Ruiz:

Q. Now, counsel said he just wanted to go [148] that far. Now, I will give you the entire composition. You will notice that I have placed some checks every place where you heretofore set forth in your comparative chart as having been similar. Have you noticed that? A. Yes, sir.

Q. And I will make the number of checks, 1, 2, 3, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, '1, '2, '3, '4, '5, '6, '7, '8, '28; have you noticed 28 checks? A. Yes, sir.

Q. Now, will you examine every one of those checks and tell me whether the tonal tempos, the values of the tempo are different?

A. On number one—I beg your pardon—your first check mark, there is a difference.

Q. Rather than go all through it, for purposes

(Testimony of George G. Schneider.)

of time, just examine them and tell me whether those checks indicate different tempos or different values as to time?

A. With one exception, sir.

Q. Instead of 28 there's 27? A. Yes, sir.

Mr. Ruiz: Very well.

The Witness: These two (indicating) has the same time value.

Mr. Ruiz: All right. You can make a circle around that. [149]

(The witness draws a circle around figures.)

Q. Now, then, as far as bringing it down to fine tempo, in the 32 bars the only tempo similarity, by way of comparison, is contained in four notes only, is that not true? A. And their repetitions.

Q. Well, how many times are those repeated?

A. In bar 1 they are the same; in bar 1 only.

Q. In bar 1 only, then? A. Yes.

Q. In other words, not even in repetitions?

A. Yes, sir.

Q. Only in bar 1, only, are tempo values similar in any of the compositions that you have made reference to? A. Tempo and tonal.

Q. I am talking about tempo and tonal, yes?

A. Yes, sir.

Mr. Ruiz: That is all.



(Testimony of George G. Schneider.)

Recross-Examination

By Mr. Hoppe:

Q. Now, Mr. Schneider, with reference to this tempo in bar 1 which I have marked with a circle——

A. Yes, sir.

Mr. Hoppe: Do you have the original exhibit? Let us get the original Exhibit C.

The Witness: What is that? What is it you are looking for? [150]

Mr. Ruiz: Your comparative analysis, the original.

Mr. Hoppe: Here it is.

The Witness: Oh, I beg your pardon. Excuse me.

Q. (By Mr. Hoppe): Now, I ask you to mark with a circle in "Blacksmith Blues" the first bar that you say the tempo is repeated only once? Would you mark that in a circle?

A. That was not the question. It was the tempo and the tonal.

Q. All right, the tempo and the tonal——

A. Yes, sir.

Q. ——would you mark that with a circle?

A. Yes, sir.

(The witness places a circle on exhibit.)

Q. And I will put an X on that circle.

(Mr. Hoppe writes an X on said exhibit.)

Now, I will segregate from that circle the top part of it which we will mark Y (Mr. Hoppe writes

(Testimony of George G. Schneider.)

a Y on said exhibit), which is the part that appears in "The Blacksmith Blues." Now, that circle marked Y with the same tempo and the same tonal arrangement appears many times in different bars of "The Blacksmith Blues," is that correct?

A. It is, sir.

Q. And how many times does it appear in the 32 bars that you have mentioned there?

A. That is the only place, sir, that that exact phrase appears in "Blacksmith Blues," in that tempo and tonal value. [151]

Q. Now, you pointed to several places here. You pointed in bar 3, which I will mark Z.

(Mr. Hoppe writes a Z on Exhibit C.)

Are there any similarities between the bar marked Z and the Plaintiff's bar within the circle marked X, in tonal value and timing?

A. There is a difference, sir.

Q. I said are there any similarities?

A. There are.

Q. And that is that in bar 3, the first note, both in tonal quality and value is identical with the first note in "Good Old Army"? A. Correct.

Q. The second note is identical in value and in quantity with the second note of "Good Old Army"? A. Correct.

Q. The third note in your song, which is "Blacksmith Blues," has the same tone but it has two flags on it, whereas in "Good Old Army" it has one flag and the dot? A. Correct.

(Testimony of George G. Schneider.)

Q. In the next note, the note differs, that is the fourth note—has the same value and the same tone?

A. No. It does not, sir.

Q. The fourth note?

A. We are past the third note. [152]

Q. No. We are up to the third.

A. Correct, sir.

Q. The fourth is identical? A. Correct.

Q. The fifth has the same change in it that the fifth note had in the phrase marked with the Y?

A. Correct.

Q. The sixth note has the same tone but a different value? A. Correct.

Mr. Ruiz: Now, you have been pointing to “The Blacksmith Blues” down here (indicating), counsel, and “The Blacksmith Blues” up there (indicating) while you have been interrogating the witness and he has been comparing “The Blacksmith Blues” with “The Blacksmith Blues.”

Mr. Hoppe: All right.

Q. All right, we will go back and we will compare—I think the witness and I were talking together here, but we will do it over again—we will compare bar 1 of “Good Old Army” and bar 3 of “The Blacksmith Blues.”

The Witness: O.K.

Q. (By Mr. Hoppe, continuing): And we will go through it again. The first note is identical both in tone and quantity? A. Right.

Q. The second note—— [153] A. Right.

Q. ——is identical both in tone and quantity?

(Testimony of George G. Schneider.)

A. Right.

Q. The third note is identical in tone but not quantity? A. The third note is the same, sir.

Q. The third note is the same?

A. Yes, sir. These two notes (indicating) are the same.

Q. They are the same?

A. Yes; on the second line with one flag with a dot after it.

Mr. Rudin: Your Honor, this all may be interesting, but it seems to me that the exhibit is in evidence, and as to the number of notes which are the same the exhibit is the best evidence of that fact.

Mr. Hoppe: He had already testified as to what the exhibit shows and his testimony isn't quite accurate, counsel.

Mr. Rudin: I haven't finished my objection. And I think there ought to be some limit on this type of cross-examination, or we are going to be here for days or weeks.

The Court: Well, I think he is about finished, Mr. Rudin. You are about finished, aren't you?

Mr. Hoppe: As soon as I go through with this, I am all through, Mr. Rudin.

The Court: All right. I will overrule the objection. [154]

Mr. Rudin: O.K., only I think the exhibits speak for themselves.

Mr. Hoppe: Now I have gotten confused here with the interruption, so let us start over again.

(Testimony of George G. Schneider.)

The Witness: We are now comparing "Good Old Army" and "The Blacksmith Blues."

Mr. Hoppe: We are now comparing "Good Old Army" and "The Blacksmith Blues"?

A. Correct.

Q. And we are comparing——

A. Bar 1.

Q. ——Bar 1 of "The Blacksmith Blues" with bar 3—no—bar 1 of "Good Old Army" with bar 3 of "Blacksmith Blues."

In each case the first note of the bar is identical both in tonal quality and in quantity?

A. Correct.

Q. The second note is identical?

A. Correct.

Q. What about the third note?

A. Correct.

Q. What about the fourth note?

A. The same.

Q. The fifth note differs in the same respect that the fifth note of bar 1 of the two pieces of music varies? A. Correct. [155]

Q. The sixth note is the same in quality but not in quantity? A. Correct.

Mr. Ruiz: Let us finish the bar, counsel.

Q. (By Mr. Hoppe): Then the 7th note is different from the seventh note of "The Blacksmith Blues" both in quantity and in quality?

A. Sir, we cannot compare them that way, because we have a shorter value on this note (indicating) than we have up here (indicating). In other

(Testimony of George G. Schneider.)

words, this note (indicating) is in both of these two (indicating).

Q. So we can't really compare after the first, second, third, fourth, fifth notes, we can't make any further comparison?

A. Excepting for the changes.

Q. Excepting for the changes?

A. Yes, sir.

Q. Now, the theme of bar 1 of "The Blacksmith Blues" or the theme of bar 3 of "Blacksmith Blues," one or the other—

A. They are different, sir.

Q. (Continuing): I am trying to put them together.

The Witness: Oh, I beg your pardon, sir.

Q. (By Mr. Hoppe): Whatever commonness they have between them the commonness between bar 1 of "Blacksmith Blues"— [156]

Mr. Ruiz: I object to the question as being speculative. Whatever difference or whatever commonness they have together is not a proper question.

The Court: Yes; I will sustain the objection.

Mr. Hoppe: All right. Thank you, your Honor.

Q. Now we will go on to bar 5—

A. Yes, sir.

Q. —of "Blacksmith Blues" and there we again have the do-mi-do-mi-sol triad, do we not?

A. No, sir; we do not.

Q. That is not the same?

A. No, sir. They are in different key now.

(Testimony of George G. Schneider.)

Q. But I understood that we have the same music if we change the key?

A. You have the same tonal relation if you change the key.

Q. All right, we have the same tonal relation between notes in 5 that we do in 1, except the key has been changed; is that right?

A. No, sir; we do not. We do not. In number 1, with your permission, sir, between our first and second tones we have an interval of a third. In bar 5 we have less than a third, we have it from a B-flat to a D.

Q. Well, let us get away from some of these musical terms and discuss it this way——

Mr. Ruiz: If the court please, this is a [157] musical copyright infringement action——

Mr. Hoppe: That is right.

Mr. Ruiz: And for purposes of the record we have to use musical terms.

Mr. Hoppe: We will——

The Court: All right, that was just a statement.

Mr. Ruiz: That was just a statement, your Honor.

Q. (By Mr. Hoppe): Now, in bar 5, the first note of bar 5 of "Blacksmith Blues"——

A. Yes, sir.

Q. ——is a dotted eighth? A. Yes, sir.

Q. The second note of bar 5 is a dotted sixteenth? A. Is a sixteenth.

Q. Is a sixteenth? A. Correct.

Q. The first note of bar 1 of "Good Old Army"

(Testimony of George G. Schneider.)

is a dotted eighth?      A. Correct.

Q. The second note is a sixteenth?

A. Correct.

Q. Now, in both bar 5 of "Blacksmith Blues" and bar 1 of "Good Old Army" the third note is up two tones higher than the second note, is that right?

A. No, sir. It is not. [158]

Q. What is it up higher?

The Witness: What happened to the piano? I would have to go to the piano to show you.

Mr. Ruiz: He said he would have to go to the piano to show him, because he is giving tempo values and they are different notes and not even the same notes, your Honor.

The Court: All right.

Mr. Ruiz: They are different notes on the scale.

Mr. Rudin: Well, if your Honor please——

The Court: Mr. Hoppe said he is about finished.

Mr. Hoppe: I am just about through, Mr. Rudin.

The Court: Go ahead.

Q. (By Mr. Hoppe: If we transpose the notes in bar 5 of "The Blacksmith Blues" so that note 1 of bar 5 is located at the same place on a staff—now this is a hypothetical question—at the same place on the staff—is this the staff (indicating)?——

A. Yes, sir.

Q. ——on the staff as the first note of bar 1 of "Good Old Army" is located—do you understand my hypothetical question?      A. Yes, sir.

Q. ——(Continuing) and if we transpose all of the other notes the same number of spaces on the staff—do you understand my question so far? [159]



(Testimony of George G. Schneider.)

A. Yes, sir.

Q. (Continuing): We would then have the relationship where note 1 of bar 5 as so transposed would be located where note 1 of bar 1 of "Good Old Army" is?

Mr. Ruiz: I would like to interpose an objection at this time. Now, the question has been this: If in the middle of that piece you change the key, he wants to know if the notes would then be similar, and since the musical composition is written in one key only, the answer gets us no place, your Honor. The notes are different, but counsel is now trying to make them the same notes by asking the witness to transpose a particular bar into a different key.

Mr. Wolff: May I add to that, your Honor, that as counsel himself has stated, it is purely a hypothetical problem of transposing notes. He wants then, as I understand the question, to compare bar 5 in "Blacksmith Blues" as thus transposed, purely hypothetically transposed, to bar 1 of "Good Old Army," the plaintiff's composition. We are comparing not only different bars in different selections, but we are taking the second selection and putting them in different places other than they are actually written.

Mr. Ruiz: That is right.

Mr. Hoppe: I would like to be heard on it. [160]

Mr. Ruiz: That is why he wants to go to the piano, so the Judge can hear it, because they are different notes.

(Testimony of George G. Schneider.)

Mr. Hoppe: Your Honor, I would like to be heard on that.

The Court: Do you want to go to the piano?

The Witness: Yes, sir.

The Court: All right, let him go over to the piano, then. You may go right over to the piano.

The Witness: Yes, sir, but before I go, may I make this statement?

The Court: Yes.

The Witness: It would be just the same thing as my saying something at the same time in English and in Latin.

We are trying to transpose one bar of a middle of a song but keep the first bar the same, and we will not get any place.

The Court: Well, Mr. Hoppe has asked you the question. You may go around to the piano and the reporter will sit over there, too.

Q. (By Mr. Hoppe): I am going to ask you to play bar 1 of "The Blacksmith Blues" and I am going to ask you to play bar 1 of "Good Old Army"; I am going to ask you to play bar 5 of "Blacksmith Blues" and then I am going to ask you to play bar 1 of "Good Old Army"?

A. Bar 1 of "Good Old Army"? [161]

Q. Bar 1 of "Good Old Army."

A. (The witness plays on piano.)

Q. Now, please play bar 1 of "Blacksmith Blues."

A. Correct. (The witness plays on piano.)

(Testimony of George G. Schneider.)

Q. Now I want you to play bar 5 of "Blacksmith Blues."

A. Bar 5 of "Blacksmith Blues." (The witness plays on piano.)

Q. Now I want you to play bar 1 of "Good Old Army." A. (The witness plays on piano.)

Q. Now, the difference between bar 5 of "Blacksmith Blues," watching your hands, and the difference in bar 1 of "Blacksmith Blues" is that in peeling off, all the notes are done roughly a third of an octave, is that right? A. A fourth.

Q. A fourth of an octave? A. Yes, sir.

Q. That was the difference between one and the other?

Mr. Ruiz: Different notes, fourth of an octave different, is that right?

A. Yes, sir.

Q. (By Mr. Hoppe): Now, when you played Exhibit D there, you had transposed all of the notes to the same octave, did you not?

A. To the same key. [162]

Q. To the same key? A. Yes, sir.

Q. And if you had played the prior art music, you would have seen some difference and many differences?

Mr. Wolf: I object.

Q. (By Mr. Hoppe, continuing): Sometimes with respect to an octave, sometimes a part of an octave and sometimes by a note difference, is that not correct? A. Correct.

Mr. Hoppe: That is all.

Mr. Wolff: If your Honor please, counsel was comparing two utterly and totally different things. He was comparing a transposition for the purpose of presenting the material which Mr. Schneider presented to the court, all in the same key.

Mr. Rudin: The music would be capable of easier comparison as to differences and similarities.

The Court: I understand that. Is there any further redirect from Mr. Schneider?

Mr. Ruiz: No.

Mr. Rudin: None on our behalf, your Honor. We have another expert witness that we would like to get through with today.

The Court: Go right ahead. Ask leading questions, if you want to. [163]

### DAVID RAKSIN

called as a witness herein on behalf of defendants, being first duly sworn, testified as follows:

The Clerk: State your name for the record, please.

A. My name is David Raksin. R-a-k-s-i-n.

The Court: Go right ahead.

### Direct Examination

By Mr. Wolff:

Q. Mr. Raksin, will you describe your educational background?

A. I had private education in music from the time I was about three years old, with various teachers, some of whom are—well, the most impor-

(Testimony of David Raksin.)

tant one is Arnold Schoenberg, who is one of the two or three greatest musicians of our day.

I studied at the University of Pennsylvania, from which I hold a degree.

I have continued my studies all through my professional career.

Q. The Degree that you have from the University of Pennsylvania, is that in the field of music?

A. Bachelor of Music.

Q. The studies that you had with Dr. Schoenberg, for example, were in what aspects of the field of music?

A. Composition, form, theory.

Q. Have you been a composer of music? [164]

A. I am a composer, I am a conductor, orchestrator, an arranger, and I have been at various times a researcher and a lecturer.

Q. Do you play any musical instruments?

A. I play at various instruments. It has been some years since I made my living as an instrumentalist, and I play the piano to some extent.

Q. Can you list for us, please, some of the musical compositions that you have composed?

A. Well, the best known films composed by me are—the scores composed by me are “Laura,” “Smokey,” “The Bad and the Beautiful,” “Forever Amber,” and “The Secret Life of Walter Mitty.” I have done I guess around a hundred films. There are all kinds of films I have—well, the manuscripts of nine of the scores of those films are in the Library of Congress, at the request of the Music Branch of the Library of Congress.

(Testimony of David Raksin.)

Q. That is somewhat of a distinction?

A. Well, no other composer can make this claim, no composer of film music I mean.

Q. Through your work in the motion pictures or motion picture film scores, would this be considered to be in the field of popular music?

A. No. It is in the field of all kinds of music.

Q. Have you any particularity with the field of popular [165] music?

A. Yes. I have written a great deal of popular music, show music. I have one song which is the second most recorded song in the history of popular music. That's "Laura."

Q. Mr. Raksin, I think the quickest way for us to get on would be to ask you, if I may, to seat yourself at the piano, sir.

(Witness complies with counsel's request.)

Mr. Wolff: May I ask Mr. Raksin to play?

Q. Do you have the sheet music of "The Blacksmith Blues" before you? A. I have it.

Mr. Wolff: Perhaps it would be preferred that he play right from the exhibits. May I also have Plaintiff's Exhibit 3, the sheet music, and 2.

Q. I am handing to you Plaintiff's Exhibit 8, which is "The Blacksmith Blues" edition, "Words and Music by Jack Holmes"; secondly the Plaintiff's Exhibit 2, which is the song entitled "Good Old Army," as well as Plaintiff's Exhibit 3, which is also "Good Old Army," written in the key of E-flat. I will ask you to place those three before

(Testimony of David Raksin.)

you and would you kindly play, first the first measure of "Good Old Army" as it appears in either one of the two "Good Old Army" versions that are before you? [166]

A. (The witness plays piano.)

Q. Now would you play the first measure of "The Blacksmith Blues"?

A. (The witness plays piano.)

Q. Mr. Raksin, you have heard I am sure in the last few moments this first measure, a theme or motif characterized as a triad, have you not?

The Court: Just answer.

A. Yes, sir.

Q. (By Mr. Wolff): A triad consists of how many notes, sir?

A. A triad consists of 3 notes.

Q. Are there three or are there more than three—

A. There are four.

Q. Let me finish my question. Are there three or more than three separate notes in the first measure of "Good Old Army" that you played?

A. There are four.

Q. And the same question as to the first measure in "The Blacksmith Blues" that you played?

A. There are four.

Q. So, strictly speaking, then, is this a triad?

A. Well, it is not strictly a triad.

Q. Could you characterize it in another way?

A. It is actually a melody, a sequence of notes, and [167] upon this triad in E-flat it contains in

(Testimony of David Raksin.)

each case a short note which you could call a passing note.

Q. So that the musical note for this fourth note is the passing note?

A. Yes, sir, the passing note.

Q. Are the passing notes upon the first measure of "Good Old Army" and in the first measure of "The Blacksmith Blues" the same?

A. They are not.

Q. What is the passing note in the first measure of "Good Old Army"? A. It is A-flat.

Q. What is it in "Blacksmith Blues"?

A. It is a-natural.

Q. Are A-flat and a-natural the same note?

A. They are not.

Q. Are there many forms in which the note A could be written?

A. Within our scale there are five.

Q. And do each of these sound the same?

A. They do not. May I play them?

Q. Would you kindly illustrate these five forms and explain to us what they are?

A. This is a-natural (witness plays on piano). This is A-flat (the witness plays on piano). [168]

This is A double flat, which is the same as G, but it is A double flat (playing piano).

Now going back up the scale, I will play A again. (Witness plays on piano.)

This is A sharp (playing on piano) and this is A double sharp (playing on piano).

So, there are altogether five notes. If you would



(Testimony of David Raksin.)

play them together, you would see the difference, it would be like this (playing on piano); and if you played A and A-flat together, they would be different, too.

They are two different notes and in this case particularly significant.

Q. In what way are they significant?

A. Well, in the matter of the intent of the first bar where you have a note that goes (playing on piano), and you have another one that goes (playing on piano).

Now, there are two significant things about the difference. One is that if it is played together, you would have (playing on piano).

And "The Blacksmith Blues" has also a difference of rhythmic intent. First, I want to make clear that these two notes are much different (witness plays on piano), which is "Good Old Army" and again, in "Blacksmith Blues" (witness plays on piano). Now, the other thing in "Blacksmith Blues"—shall I go on? [169]

Q. Please do.

The Witness: —the fact that there is a syncopation on it and which is carried out to the end of the bar, and the intent is usually to lap the rhythmic impulse over into the next bar, so you get (witness plays on piano). You see, that thing is the significant thing to a musician, that, and the difference in the a-natural and in A-flat.

Q. (By Mr. Wolff): You are now referring, if I understand you correctly, to the last note in "The

(Testimony of David Raksin.)

Blacksmith Blues,” and for the same portion of the measure of “Good Old Army”; there is a note in “The Blacksmith Blues,” whereas, there was a rest in “Good Old Army”?

A. That is right. This note does not exist in the “Good Old Army.”

Q. That note doesn’t exist?

A. It does not appear at all.

Q. And that note is a carry-in to the next measure?

A. Yes, it is a rhythmic carry-in, into the next one.

Q. Mr. Raksin, would you now play measure number 2 of “Good Old Army”?

A. (The witness plays on piano.)

Q. Would you now play measure 2 of “The Blacksmith Blues”?

A. (The witness plays on piano.) [170]

Q. Are you able, sir, to play those two together?

A. I doubt it, but I will try (the witness plays piano). That’s it, and that is when they go together.

Q. And in those measures, measure No. 2, respectively, of these two compositions, are there significant differences or similarity?

A. There are, yes, there are significant differences, both, in rhythm, for instance, the first beat in “Good Old Army” is in that bar (playing on piano), and the other one is up here, an octave higher, like that (playing on piano) and it goes down, it goes (witness plays on piano), whereas, in

(Testimony of David Raksin.)

“Good Old Army” it goes up (witness plays on piano).

Then, of course, there is also the fact that in “The Blacksmith Blues” you have this a-natural.

I will play “Good Old Army” with my left hand and “Blacksmith Blues” in that bar with my right hand (the witness plays piano). You see, the bars are different, the rhythm is different; the descending line in “The Blacksmith Blues,” the ascending line in “Good Old Army” and the a-natural versus the A-flat are different.

Q. I will ask you to play bar 3, if you would, please of “Good Old Army”?

A. (The witness plays on piano.)

Q. Would you play bar 3 of the “The Blacksmith Blues”? [171]

A. (The witness plays on piano.)

Q. Do I dare ask you to play the two of those together?

A. Maybe you do, but I don’t know whether I can do it. Let me see. (The witness plays on piano.)

Q. There are significant differences in bars 3?

A. I think they are so audible that it doesn’t take a musician to hear them.

Q. Going on now, then, with bar 4, play bar 4, first, if you please, of “Good Old Army”?

A. (The witness plays on piano.)

Q. And would you play bar 4 of “The Blacksmith Blues”?

A. (The witness plays on piano.)

Q. And together?

(Testimony of David Raksin.)

A. Together? (Witness plays on piano.) Wait a minute. We are on bar 4 now, are we?

Q. Yes.

A. Let me see (witness hums). Well, in "Blacksmith Blues." I guess I would have to play up on the top (witness plays on piano).

Q. Any comments, Mr. Raksin, that you can make as to a comparison of the respective bars 4?

A. Well, they are not the same, very clearly not the same.

Q. Can we go on, then, please? Would this assist you—— [172]

Mr. Rudin: Do you have any objection if Mr. Schneider plays one of the lines?

The Witness: Maybe one of the other gentlemen can play one of the lines, because it is hard to play the two of them.

The Court: All right.

Q. (By Mr. Wolff): We are now on bar 5, if you please. A. Bar 5.

Q. Would you play bar 5 of "Good Old Army"?

A. Bar 5 of "Good Old Army" (the witness plays piano). That is bar 5 of "Good Old Army."

Q. Would you play that again?

A. All right. (The witness plays on piano.)

Q. Can you proceed and also play bar 5 of "The Blacksmith Blues"?

A. (The witness plays on piano.)

Q. Now, can we have our duet, Mr. Raksin, playing?

(Testimony of David Raksin.)

(Piano played by Mr. Raksin and Mr. Hoefle.)

Q. Can you make any comments as to the similarity or dissimilarity of those bars?

A. Well, just as an indication, the bar 5 of "The Blacksmith Blues" has six notes and bar 5 of "Good Old Army" has 3 different notes. One note is tied over to another. That means it is the same note.

Q. And melodically? [173]

A. Melodically, of course it is very easy to see that there is no similarity between this which is "The Blacksmith Blues" (the witness plays on piano) and the "Good Old Army" again, which is (the witness plays on piano).

Q. Thank you. Please play bar 6, if you will, now? A. Of the "Good Old Army"?

Q. Yes, of the "Good Old Army."

A. (Witness plays on piano.) That is "Good Old Army."

Q. And bar 6 of "The Blacksmith Blues"?

A. (The witness plays on piano.)

Q. Can you play those two together?

A. Play them together. Let me see if I can find this bar; 1, 2—(the witness plays on piano).

Q. Are there any comments, if you would, please, on the similarities or dissimilarities of bar 6, Mr. Raksin?

A. There are no similarities that any reasonable musician could perceive.

(Testimony of David Raksin.)

Q. Are you speaking both from the standpoint of the notes as well as the rhythm?

A. The notes, the rhythm, and if I am permitted to say so, what you hear, the intent.

Q. Would you now play bar 7, if you would, please, of "Good Old Army"? [174]

A. I just want to make sure I get the right bar. There is 3, 4 (witness plays on piano); one note.

Q. And bar 7 of "The Blacksmith Blues"?

A. (The witness plays on piano.)

Q. Can you play them together?

A. 1, 2, 3, 4 (the witness plays piano).

Q. Bar 7 of the "Good Old Army" is a whole note, is it not?

A. Yes, it contains one note.

Q. Which is properly given how many counts in measurement? A. In this count, four.

Q. And how many notes are there in bar 7 of "The Blacksmith Blues"? A. There are 7.

Q. And tonally, do the notes blend well together?

A. They do not, because this is G-flat in the "Good Old Army" which is the minor third of the scale and the significant note in determining that scale or deciding whether it is a major or a minor, and here you do have a G which is also at the end.

Q. Where is "here," Mr. Raksin?

A. I beg your pardon. In "The Blacksmith Blues," it does have a G, which is a G-natural, though, at the end of the bar, and it is the sixth note of the seven, whereas, the G-flat is the only

(Testimony of David Raksin.)

other note in the bar and consequently you can't call it significant. [175]

Q. Will you now make the same comparison with number 8? First, would you play the "Good Old Army"?

A. (The witness plays on piano.) That's it.

Q. I am lost in your "That's it."

A. Yes, the wording is "Yes, I love it" and the note is just that (witness plays on piano).

Q. And then there are rests? A. Rests.

Q. For the balance of the measure, is that right?

A. Precisely.

Q. And then would you play bar 8?

A. (The witness plays on piano.) Now, the comment there is very simply that they are both of them phrases, or 8-bar phrases; in this case, we have an F-natural (witness plays on piano), one note with three beats, rest, and in the note itself you have a very significant thing, which is a triplet (witness plays on piano), and you also have this F sharp which of course is a passing tone in the key and it does not appear at all in "Good Old Army." It is just in this bar (witness plays on piano), and that is "The Blacksmith Blues," and the "Good Old Army" in the same bar is (the witness plays on piano).

Q. I take it, then, from the shortness of the note in bar 8 of "Good Old Army" and from the fact that there are numerous notes in "Blacksmith Blues," that there are [176] rhythmic differences as well as tonal differences?

(Testimony of David Raksin.)

A. There are. In the 8 bars there are rhythmic differences. The triplet does not appear anywhere in the "Good Old Army." It is a different kind of rhythmic stunt, a different intent.

Q. One more question concerning bar 8. You stated, if I understood it, that both bar 8's are the customary tones of a phrase or something to that effect?

A. They are the concluding bar of an 8-bar phrase. This song is written—both songs are written in forms where the 8-bar phrases are significant.

Q. Are the 8-bar phrases common or now in popular music?

A. They are so common that it is unusual to find one which is not 8 bars long.

Q. Then it is the rule, I take it?

A. It is the rule.

Q. The fact that both songs have 8-bar phrases, would you characterize that as a significant similarity?

A. Not possibly.

Q. Then going on with the songs, the two songs, then, go back and repeat essentially the first portions of their melodic lines, is that correct?

A. Yes. The "Good Old Army," if I make it out to be correct, repeats exactly, and so exactly that it is substantially within a note or two exactly the same thing. [177] You can look at them. They are the same thing. Here is the a-natural in one bar and in, 1, 2, 3, 4, in the 9, 10, 11, 12th bar of "Good Old Army" there is an A-natural in the descending tone which—may I play it?



(Testimony of David Raksin.)

Q. Play bar 12, then, first in "Good Old Army."

A. (The witness plays piano.) "Good Old Army" (playing piano).

Q. Could you play bar 12 of "The Blacksmith Blues"? A. (The witness plays on piano.)

Q. Can you play those two bars together?

A. (The witness plays on piano.)

Q. Are there any other changes in "Good Old Army" from the first eight bars to the second, as compared to the second bar?

A. I do not see them, no. No. They are not there.

Q. Are there any changes in the second eight bars of "Blacksmith Blues"?

A. There is one, the fact that this bar 5, when it comes back again, instead of going like this (playing on piano), and with intent to go into the next bar, and with this one it is a whole note, and bar 1 to 12, 10, 11, 12, 13, 14, it is a whole note, meaning four beats. There is this difference there, if you wish to compare it with the same bar, bar 14.

Q. Yes, I would, please. [178]

A. (Witness plays on piano.)

Mr. Hoefle: Where are you?

Mr. Raskin: Now, we can play them together, play them where they can be heard right here.

Q. (By Mr. Wolff): Will you tell us what you are playing now?

A. Mr. Hoefle is going to play 14 of "The Blacksmith Blues" and I am going to play bar 14 of "Good Old Army".

(Testimony of David Raksin.)

(The piano was played.)

So it is perfectly obvious that in "Good Old Army" it has a single E-flat for four beats, and the other piece has seven different notes. The rhythm, of course, is completely different.

Q. Now, the portion of "Good Old Army" where it begins with the words, "Oh, many people think its rough"—

A. Yes.

Q. —what is the name for that portion of the piece?

A. Well, it is sometimes called the middle; sometimes called the release.

Q. Does the middle or release of "Good Old Army" correspond to the middle or release of "The Blacksmith Blues"?

A. There is no middle or release in "The Blacksmith Blues." There is no difference in form, if I can explain it.

Q. Do so.

A. The "Good Old Army" is written in what is called AA-BB form which means very simply that the first phrase [179] put in these songs happens to be eight bars fundamentally the same as the second eight bars, in other words, you got eight bars called B and eight bars called A again; then you have got a middle section which is also eight bars long, the so-called B, that is the release or middle; the last section is note A again. So in an ordinary tune, to make it simple, it is just like this (Witness plays on piano): the second section, which is A again;

(Testimony of David Raksin.)

then the third one, which is the release which would go this way (Witness plays on piano), which is different, and then you would come back to the A phrase again, which would be like this (Witness plays on the piano). "Good Old Army" has this form, AA-BA, it is an AA-BA song; whereas, "The Blacksmith Blues" is AA, change, which means it is a song of the eight bar first phrase and an eight bar second phrase. There is no middle at all in this song.

Q. Am I correct, then, Mr. Raskin, that the general structures of the two selections are different?

A. Quite different.

Q. Returning now to the first measure of "Good Old Army" and the first measure of "The Blacksmith Blues," that you have characterized, as I understand you, as a triad with a passing tone? [180]

A. Yes.

Q. Can you play the thematic material of "Good Old Army" or the first measure of "Good Old Army"? A. The witness plays piano.)

Q. Now, is that, to your knowledge, a common motif or phrase in musical composition?

Mr. Hoppe: Wait. We object to that, unless the music is put in evidence. Of course, we require the time and the place, and that is something an expert is not qualified to testify to without music.

The Court: I will overrule the objection. He may answer.

A. I have examples here, your Honor, and there is different combination of notes, not only as in the public domain. It is inescapable.

(Testimony of David Raksin.)

Q. (By Mr. Wolff): Inescapable?

A. Yes. All we have to do is to look at the number of examples provided in the two books which we use primarily as evidence, which are *The Standard Reference Works* by Barlow and Morgenstern and "*A Dictionary of Musical Themes*", both the orchestral and vocal, and I have written down each and every descriptive example which employ those notes both from the standpoint of pitch or tone and from the standpoint of rhythm.

Q. May I take out some of those and show them to counsel? [181]

The Witness: Here they are, if you want them, if you bring them back. I may want to use them again.

The Court: Are you through with him now, Mr. Wolff?

Mr. Wolff: No, your Honor. I want to show these two to him.

The Court: All right.

Mr. Wolff: And while counsel is examining them, I would have more.

Mr. Rudin: I might state that this phase of the direct examination which we might refer to as the historical phase of it will take more than five minutes, and I know your Honor's commitments. We would be most happy to continue, but we are not going to get through with this expert witness by 12:30.

The Court: I guess this is a good time to stop.

Mr. Rudin: Yes.

(Testimony of David Raksin.)

The Court: As I told you yesterday, when we made the arrangements, I said I would run to accommodate anybody, but the way Mr. Hoppe examined Mr. Schneider I am sure we are not going to get through with this gentleman in four or five minutes.

Mr. Rudin: I think it would be at least another hour.

The Court: How long is the rest of your defense going to take, Mr. Rudin?

Mr. Rudin: Well, we have just a short amount of [182] evidence to put on, on the defense.

The Court: Shall we start at 10:00 and then we will adjust our time during the noon hour?

Mr. Rudin: That will be fine.

The Court: In other words, tomorrow, if you gentlemen want to finish, we can all kind of take a short noon hour, if we have to.

Mr. Rudin: All right.

Mr. Hoppe: I think that would be excellent, your Honor.

Mr. Wolff: I am sorry, Mr. Raksin, but we couldn't finish in the time allotted.

The Court: No. You still want the piano now?

Mr. Rudin: Yes.

The Court: We don't care. We have the Naturalization proceedings here on Friday. What will we do with the piano Mr. Miller (The Bailiff), Friday morning?

Mr. Wolff: I believe that I can have it taken away on an instant's notice.

(Testimony of David Raksin.)

The Court: We will arrange about the piano tomorrow.

Mr. Rudin: But it can stay here tomorrow morning.

The Court: Have the piano here tomorrow morning. We will work that out. Counsel, we will run from 10:00 to 12:00 and then we will adjust our noon hour accordingly so as to try to get through.

(Whereupon an adjournment was taken until the following day, Thursday, September 19, 1957, at 10:00 a.m.) [183]

Thursday, September 19, 1957—10 A.M.

The Court: All right. Have the witness resume the stand.

Mr. Wolff: Mr. Raksin, just resume the stand that you were on yesterday, which is the piano stool.

DAVID RAKSIN,

resumed the stand on behalf of defendants, having been previously duly sworn, and testified further as follows:

Mr. Wolff: If your Honor please yesterday at the adjournment I had just shown to counsel several sheets on which music had been noted, which Mr. Raksin was about to use to testify as to what he called the unavailability, if I remember his word correctly, of the use of the particular phrase that was involved in the first measure of the plaintiff's song "Old Army" Blues, and I would like at this

(Testimony of David Raksin.)

time to have the Clerk mark these for identification. Had you had sufficient examination of those?

Mr. Hoppe: No. It would take me hours to look at those, counsel, so you proceed.

The Clerk: That will be Defendants' E marked.

The Court: E.

(Said documents were marked as Defendants' Exhibit E.)

Q. (By Mr. Wolff): All right now, Mr. Raksin, would you kindly play for the court and identify each one of the [186] selections that you are playing from these source materials which you have noted on your musical sheets which is Defendants' Exhibit E for identification?

Mr. Hoppe: May it please the court, we object to any testimony based upon Exhibit E for identification in so far as Exhibit E has not been proved. The chart, Exhibit E, is not the best evidence of what was in the public domain on April 7, 1941, and, hence, it is inadmissible except upon proof of the fact that the best evidence is unobtainable; furthermore, that there has been no testimony identifying this exhibit as purporting to be a faithful reproduction of that which was in the public domain on April 7, 1941; and for that reason, your Honor, we submit that the document is not admissible in evidence and that questioning based upon the document is not admissible in evidence.

The Court: I will overrule the objection.

Mr. Hoppe: May it be understood that my objection goes——

(Testimony of David Raksin.)

The Court: To all this line of testimony.

Mr. Hoppe: ——to the entire line of testimony based upon this exhibit.

The Court: All right. Yes.

Mr. Hoppe: All right; thank you.

Q. (By Mr. Wolff): Mr. Raksin, the selections that you have noted on Exhibit E, can you explain to us, sir, from whence they come? [187]

A. With possibly three exceptions they come from the two standard works in the field, "A Dictionary of Musical Themes," by Barlow and Morgenstern, and a Dictionary of Vocal Themes, by Barlow and Morgenstern. These are the two works referred to in all library research frequently in adjudications.

Q. And how does one go about finding a selection in either of these two dictionaries?

A. There is an index in the back; there are actually two indexes. The important one is the notation index in which everything is reduced to the key of C which means that the notes are all written down in the index for identification as though they were done in the simplest and most direct key, which is C, so that if a piece goes—may I play?

Q. Please.

A. If a piece goes like this (Witness plays on piano), which is in the key of E, it would be very hard to identify for anybody looking at the index; they do it this way (Witness plays on piano), which is the same tune, as you can hear, but transposed so that it will fit in the index, so when you see ex-



(Testimony of David Raksin.)

amples, what you do, as you notice, you note that the tune "Waitin' For My Baby" goes (Witness plays on piano) and you look for those notes in the key of C which are these (Witness plays on piano), like that, so you [188] would look under C, C, E, E, G, G, and under C, E, G, and all the other notes, F, G——

Q. Is that the procedure that you followed in compiling the notes that appear on Defendants' Exhibit E?

A. This is the procedure I followed. Additionally, I chose examples which are in the popular music field which are not to be found in music themes.

Q. And in addition to your use of these two standard reference works, do you know, of your own knowledge, from your experience in the musical field of the selections that are noted on Defendants' Exhibit E?

A. Yes, I do.

Q. Do you know, sir, whether these, the notes that appear in the reference work are proper and correct copies of the originals of those selections?

A. Well, this is about as scholarly a work as you can find. There may be occasional slips of notations, sometimes, which will happen, but I have rarely found it, and they prefer to leave them out when they are not quite sure.

Q. All right. Now, Mr. Raksin, if you would, please play and identify the selections?

A. Well, I have a tremendous number of them, so I will just play until you stop me.

This is with regard to the first four notes, which

(Testimony of David Raksin.)

as I said, was inevitable in music, and this is [189] from Beethoven's Quartet in F Opus 135 (the Witness plays on piano). And then this one is from——

Q. Mr. Raksin, let me interrupt you. Do you have any idea as to the date of the Beethoven Quartet?

A. Oh, this was sometime in the 1800's. I don't know exactly when it was, but in any case I think that—would it be all right if I specified before nineteen—what is the date in question?

Mr. Hoppe: 1941 is the date in question.

Mr. Wolff: Well, place it as closely as you can, approximately. If you place it before 1900, that date I am sure will satisfy us.

The Witness: The dates of Beethoven I can look up here, but it would require time looking up.

Mr. Wolff: If you can just place it by the century? A. In the 1800's.

Q. And before 1900?

A. Before 1900, quite right.

Now, here is a piece from Glinka, an Overture called "Russlen and Ludmilla," and it is an overture and it starts this way (The Witness plays on piano).

Q. Would you place the Glinka selection, approximately in time? A. Before 1800.

Then, here is Beethoven "Pathetique" Sonata No. 8 [190] in G and that begins this way (Witness plays on piano).

Now, what I am doing here is giving examples which show the first four notes of "Waitin' For My

(Testimony of David Raksin.)

Baby” which are in this key (Witness plays on piano).

Here is one which has six notes, a composition by Ingelbrecht. It is called “Nurseries” and it goes like this (Witness plays on piano). The first notes, which have repeated notes in them, of course, are (Witness plays on piano).

And then now I am talking about the—actually the first four notes, also, in this one (Witness plays on piano).

Q. Will you place that selection in time?

A. That is around 1910.

Now I would like to skip over, because there are so many of these, and see if I can find some of the others.

Here is one which I think has—This is Gluck, date: 1714, died 1787, and this is from a composition called “*Iphigenia en Touride*” and it begins with the same first five notes (Witness plays on piano).

Then, here are some examples.

Oh, here is another one like that. This is by a man named Couillart, who lived in the 16th century, and it is called “*Viri Galilaei*” and it goes like this (Witness plays on piano). The rhythm is different, of course, but [191] the notes are there (The witness plays on piano); it has a missing note (witness plays on piano), the second note.

Now, I will give you a few samples which use the natural note, in other words, the difference, and I say a significant difference in “*The Blacksmith Blues*” which, as you know, differs immediately in this respect (The witness plays on piano), instead of

(Testimony of David Raksin.)

(witness plays on piano). And as I say, we consider this generations away in thinking.

This first one is by Poulenc, a composition called "Tel Jour, Tel Nuit", and it contains these notes—this work was written about 1930—(Witness plays on piano), you see, this note, (Witness plays on piano).

Then, here is another one, written by Vittoria, who died in 1611, and who was a liturgical composer, and it goes like this (Witness plays on piano). I will play that again (Witness plays piano).

Shall I play more?

Q. Well, I think you mentioned, Mr. Raksin, if I am not mistaken, that you have some sources other than old classical music, but rather popular music?

A. Yes.

Q. Am I correct?           A. I have, yes. [192]

This comes from a supplementary comparison chart made by Harold Barlow, who is one of the authors of these two works, and in the end of Mr. Barlow's supplementary comparison chart, which of course also has some others which I wish to play, he has the two popular versions of "When the Saints Go Marching In," which is a very well known spiritual.

Mr. Hoppe: May I interrupt here, your Honor, and make an additional objection to this exhibit, on the ground that part of it is hearsay?

The Court: I will overrule the objection. He may answer. We will try to stay away from hearsay.

(Testimony of David Raksin.)

Q. (By Mr. Wolff): Mr. Raksin, are you familiar with the song, "When the Saints Go Marching In"? A. I am, indeed.

Q. And the notes as written on what you described as a comparison chart, do they correctly show this song?

A. They are correct, and if I may explain what this means. There was a picture made not long ago called "Ink Alley Blues," and I think in the beginning of that they used "When the Saints Go Marching In" and in the form which is most applicable here. Originally, "When the Saints Go Marching In" was sung as rather a slow sort of a spiritual, and in that form it was done like this (witness plays piano). Now, you will notice [193] that the first four notes are the same first four notes of "Waitin' For My Baby." But in the days when I played in bands, and this is not simply hearsay, it is here if you can call it that, because I have heard this work played thousands of times, and it can be verified literally in the film and in the records, this is the way the colored band played it, and when they played funerals they always marched home, playing a fast march, and it went like this (the witness plays piano), and so on. Now, those are the notes, if you will listen to them. You have "Waitin' For My Baby," which goes like this (witness plays piano), and this one goes like this (witness plays on piano), or (witness plays on piano), and it would be done like this, with this kind of a base, which we call a "shuffling" base, they are

(Testimony of David Raksin.)

played either with a band base, which is (witness plays on piano), or they play like this (witness plays piano), like that.

That shuffling base rhythm or march, walk-march rhythm is one of the rhythms they used in that.

Mr. Barlow has made a comparison chart at the bottom of this which has——

Q. Mr. Raksin, I prefer that you confine your testimony to what you yourself—when you were illustrating the styles of playing “When the Saints Go Marchin In,” were you at that time testifying from your own knowledge? [194]

A. I am testifying from my own knowledge.

Q. That is as to how the march was played?

A. Yes, I was testifying from my own knowledge.

Q. All right. Proceed? I am sorry.

A. Now, as to the first few notes and the repeating of notes, Mr. Schneider used an example, which I also have down, which is the famous Mazurka “La Czarina,” by Ganne, and that has the dotted rhythm (witness plays piano); the whole composition goes (witness plays piano), like that. Now, this rhythm is a significant one (witness plays piano), so you have (witness plays piano), what I just played (witness plays piano) is “Waitin’ For My Baby,” and this is “La Czarina” (witness plays piano), like that.

There are other examples. There is a famous Symphony of Mozart, who was in the 1700’s, before

(Testimony of David Raksin.)

1800. It is Symphony No. 36 in C, K 425, it is the way you must identify them, and it is called "Linz" and it begins like this (witness plays piano), like that, with that same dotted rhythm.

There is an Overture, by Weber, who was in the 1800's, before 1900, called "Peter Schmoll," which has that same rhythm. It is written somewhat differently, but the effect is exactly as I will play it (witness plays piano), like that, you have these notes again (the witness plays piano). [195]

Q. Go back to the Mozart example, if you will, please, and play the first four notes of the Mozart selection?

A. (The witness plays piano.)

Q. Now, play the first four notes of "Waitin' For My Baby"?

A. (The witness plays piano.)

Q. Are those identical?

A. They are identical, yes. There is a small difference, which should be noted, and that is, in the case of "Waitin' For My Baby" which is in 4/4, the notes are—the time designations are dotted eighth note and 16th, dotted eighth note and 16th.

Here the designation is eighth note, 32nd rest, 32nd, eighth note, 32nd rest, 32nd rest. Now, I make this point because this is the look of the music.

In actual sound I do not believe that anybody can tell the difference at this speed, because at the tempo at which these works are presumed to be played which is let us say 120, which is the equivalent of what we call a 12-frame track of notes in very close

(Testimony of David Raksin.)

track, or 120 beats to the minute, the tempo goes like this: One, two, one two, one two, it is the same as the Marine March step (witness snaps fingers), and anybody that can tell the difference between a sixteenth note and a 32nd note at that tempo is a better man than I am, because it is like this (witness plays piano), and that is "When the Saints [196] Go Marching In," or it would be like this in 32nds (witness plays on piano). Now, the difference is absolutely infinitesimal. It exists really on the paper.

Q. All right, Mr. Raksin, any other examples that you wish to play?

A. Well, there is another comparison chart which you have seen, which I would like you to look at, which is the one which has the red notes, which shows where the actual similarity of notes exist.

Q. May I show this comparison chart to counsel. Is this one that has already been marked?

A. This has been marked.

Mr. Wolff: This is part of the exhibit, counsel, but it is not a series of other sources, and I will question, counsel, regarding this comparison chart.

Q. Mr. Raksin, did you prepare this comparison chart?

A. I did not. It was prepared by Mr. Barlow, the same gentleman I identified before as being one of the co-authors of these two standard references.

Q. Have you checked the comparison chart that you are now referring to——

A. I have checked it.



(Testimony of David Raksin.)

Q. —against both the sheet music of “The Blacksmith Blues” and the sheet music of “Good Old Army”? A. Yes, sir, I have. [197]

Q. And do you find that comparison chart correct? A. I find it correct, yes.

Q. Do you agree with the comparisons that are shown thereon?

A. I agree with the comparisons. There is one very confusing place in the notation. This was taken from “Waitin’ For My Baby,” that version of the song, and it has been noted as the composer apparently noted, set it down. It is correct in so far as the actual number of beats in the bar, but the notation is so complex that it would not be so noted by a musician.

Q. I see.

The Witness: But it is correct as noted on “Waitin’ For My Baby.”

Q. (By Mr. Wolff): And what does this comparison chart show?

A. This comparison chart undertakes to show where the actual similar notes are in “Waitin’ For My Baby” and in the “Blacksmith Blues” and the notes which are similar and which occur on the same beats are in red, so that they need not be understood as musical notes but seen as being exactly the same or different.

Q. How many notes in red, which are the similar notes, is that correct—

A. Yes. [198]

Q. How many notes in red are there on the comparison chart?

(Testimony of David Raksin.)

A. Well, over 16 bars, which means where the choruses are, where the choruses begin, in other words, the beginning into the upbeat. "Waitin' For My Baby" goes somewhat longer than "Blacksmith Blues," as we showed yesterday, and over these sixteen bars there are 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, with the possibility of two more which occur slightly differently, for which he has dotted lines showing, but they are more or less the same.

Q. And that is out of a total notes, or approximately how many?

A. Well, out of 16 bars—well, I can count them, which would be the best thing to do. There must be eighty—say 125 notes or so, or 140 notes.

Mr. Wolff: All right, Mr. Raksin.

Your Honor, we would like at this time offer Exhibit E——

The Court: All right.

Mr. Wolff: ——which has previously been marked for identification, in evidence.

Mr. Hoppe: Your Honor, we have no objection to it being received in evidence as illustrative of the testimony of the witness, but we do object to it being in evidence as factual testimony.

The Court: All right. I will overrule the objection. [199]

Mr. Hoppe: And we repeat our objection.

The Court: Yes. I overrule the objection, and let it be received.

The Clerk: Defendants' E in evidence.

(Testimony of David Raksin.)

(Said documents were received in evidence as Defendants' Exhibit E.)

The Court: Is that all now, Mr. Wolff?

Mr. Wolff: There is just one more short series of questions, if your Honor please.

The Court: Do you want him back on the stand, or do you want him to remain there?

Mr. Wolff: He can stay there.

The Court: He can stay there.

Mr. Wolff: He can stay there.

Mr. Wolff: It is not going to be piano questioning.

The Court: The reporter is right there, so it is all right.

The Witness: I would like to say that the gentlemen over here had told me that 103 notes exist in the frame of the chorus of "Blacksmith Blues," 103 notes.

Mr. Wolff: Thank you.

Q. Mr. Raksin, you have compared "The Blacksmith Blues" with the "Good Old Army," with the tune "Waitin' For My Baby," have you not?

A. I have. [200]

Q. Based upon your comparison and utilizing your experience and expert tune in the musical field, have you formed an opinion as to whether the composer of "The Blacksmith Blues" appropriated material from "Good Old Army" or "Waitin' For My Baby"?

Mr. Hoppe: May it please the Court, I object

(Testimony of David Raksin.)

to the question. It is not the province of an expert to decide the question at issue. That is a question for the Court.

The Court: He is just going to give his opinion, that is all. It is a matter of credibility.

Mr. Hoppe: I don't think it is a proper subject matter for a question.

The Court: It is a matter of credibility. He is just going to give his opinion. I will overrule the objection. You may answer the question.

A. It is my opinion that "The Blacksmith Blues" was not appropriated from "Waitin' For My Baby." It is a completely different song.

Q. (By Mr. Wolff): Can you explain and justify or explain how you reached that opinion, Mr. Raksin?

A. Well, it involves my appraisal of songs. I see hundreds of songs all the time in the Studio and sometimes with regard to publishing or recording, and it is the intent of a song which is important.

In "Waitin' For My Baby" you have a song which begins [201] obviously up, it starts with (witness plays piano).

Now, the way this song is written, the stress in it is evenly divided between the first phrases, by which I mean after the upbeats, the first four bars and the second four bars, so after you have played the first two bars which are like this (witness plays on piano), "Waitin' For My Baby" (the witness plays on piano), and then you go (witness plays on piano),

(Testimony of David Raksin.)

now, that, bars 3 and 4 are kind of a little answer to bars 1 and 2, and they are completely different in intent and content from "The Blacksmith Blues" which goes right away, presents its answer, goes (witness plays on piano); you see, in other words, "Blacksmith Blues" has a one-bar statement and a one-bar answer, another one-bar statement and another one-bar answer, another one-bar statement and another one-bar answer. By an answer I mean just precisely that, it goes down (humming); in other words, it answers itself right away. The song is written in a different way. Whereas, "Waitin' For My Baby" will have a two-bar statement or pairation and a two-bar answer.

And then, bars 5, 6, 7 and 8 are completely different and do this, which is not done in the other song at all, and introduce this flatted note; in other words, your key is here (witness plays on piano). like that (playing on piano), like that; in other words, that is [202] about as different as you can get from the similar bars here. I will play them both. First I will play "Waitin' For My Baby." bars 5, 6, 7 and 8, which I just played, which are like this (witness plays piano); and bars 5, 6, 7 and 8 of "The Blacksmith Blues" go (the witness plays piano). I played one note from bar 9 because that is where the tune resolves.

In the case of "Waitin' For My Baby" you finish on bar 8 and there is no carry-over into the next bar. It just finishes like this. I now play bars

(Testimony of David Raksin.)

7 and 8 (witness plays on piano), one, two, three and four, and then starts again; whereas, in the case of "The Blacksmith Blues," the bar 8 which is the bar which concludes the first eight bars and goes into the next eight bars, in kind of an 8-bar-8-bar form, goes like this (witness plays on piano) and laps over into this note (witness plays on piano) in bar 9.

The intent is different. You have the introduction of a triplet (witness plays on piano), like that (witness hums), that thing is called a triplet.

In other words, the songs are, in intent and content quite different.

Mr. Wolff: Thank you, Mr. Raksin. We have nothing further to ask you.

The Court: Mr. Hoppe, do you want to keep him over there? [203]

Mr. Wolff: One more thing: I would like to show Mr. Raksin Defendants' Exhibit B, please.

Q. Now, Mr. Raksin, I will show you a book of music entitled in French "36 Etudes Transcendantes," by Theo Charlier. I will ask the clerk to mark this next in order for identification.

The Clerk: Defendants' Exhibit F.

(Document marked Defendants' Exhibit F for identification.)

Q. (By Mr. Wolff): I will now show you page 1 of Defendants' Exhibit F and ask you whether or not the notes in the first two lines of Defendants'

(Testimony of David Raksin.)

Exhibit F correspond to the notes of Defendants' Exhibit B?

A. You refer to bars 1, 2, 3, 4, 5, 6, 7 and 8?

Q. That is correct.

A. They are exactly the same.

Q. So Defendants' Exhibit B is a correct copy of the first eight bars of the Charlier book, Defendants' Exhibit F?      A. Yes.

Mr. Wolff: If counsel doesn't object, I would like to ask the Court for permission to withdraw Defendants' Exhibit F at such time as is convenient——

The Court: All right.

Mr. Wolff: ——and we will photostat, if you prefer, [204] counsel. This is a borrowed copy from a trumpet teacher here in town, and I promised him faithfully that I would return it if at all possible.

Mr. Hoppe: Your Honor, we have no objection, and suggest that the photostat be made of the cover page and of page 1.

The Court: All right.

Mr. Rudin: Counsel, may we have the understanding that we can withdraw the book at this time, we will have the photostat made, send you a copy, and then mail it to the clerk?

Mr. Hoppe: Certainly.

The Court: All right. Mail it to the Clerk.

Q. (By Mr. Wolff): Mr. Raksin, would you play those first eight bars written in Defendants' Exhibit B which are identical, as I understand it, to number 1 in Defendants' Exhibit F?

(Testimony of David Raksin.)

A. Yes, sir. I will. (The witness plays on piano.)

Q. Can you now express an opinion as to whether or not the notes that you have just played bear a similarity to "The Blacksmith Blues"?

The Witness: They are almost——

Mr. Hoppe: Wait a minute. May it please the Court, we object to this question being answered, on the ground that that is not a proper province for expert testimony.

The Court: I will overrule the objection. He may answer. [205]

A. They are almost the same tune. In fact, when you showed it to me, I was flabbergasted. You see what happens in "Blacksmith Blues"; I will play them and you listen to them and you will see. This significant note, which is this note in "Blacksmith Blues" (the witness plays on piano), in this key (witness plays on piano), you see here does this (witness plays on piano) and keeps doing this. That is one of the things that differentiates it. This Frenchman, who was just writing a trumpet articulation exercise, wrote the same thing.

Now I will play this "Blacksmith Blues" eight bars. (The witness plays piano.) I would like to stop and play four, and then I will play the whole thing, just so you can see before it is forgotten. Now, here is the Charlier articulation exercise (witness plays piano); so, in other words, he is doing the same thing. The first bar goes (witness plays on piano), and here you got (the witness plays piano). Then he answers it in the second bar exactly the



(Testimony of David Raksin.)

same way (witness plays on piano). That is right, it is the same answer. I am sorry. I will play the first bar again (witness plays on piano).

“The Blacksmith Blues” answers itself this way (the witness plays on piano.)

Then, bars 3 and 4 of the Charlier trumpet exercise are like this (witness plays on piano). [206]

And in this, in bar 5—4, which is the important change, you modulate, which means that you indicate that you are going to make a change of key and instead of having this (witness plays on piano), you have this (witness plays on piano), you have (witness plays on piano), which both tunes do; (witness plays on piano) that means he is going into a new key, which he does in the next bar, and the Charlier trumpet exercise book goes like this (witness plays on piano). Now, that, the last bar in intent and in content is dissimilar, but before that—I will play these bars 5, 6, 7 and 8 again and then I will play “The Blacksmith Blues” and you will see how, having modulated, he stays in the new key just exactly like it. “Blacksmith Blues” does like this, this is the trumpet book: (Witness plays piano), and here is “Blacksmith Blues,” the second part, bars 5, 6, 7 and 8 (witness plays piano)—I beg your pardon. I am transposing and it is not easy. I would like to try it once more (witness plays piano). I am sorry it took a long while to do.

Q. (By Mr. Wolff): Now, Mr. Raksin, very briefly can you make the same comparison of the

(Testimony of David Raksin.)

Charlier exercise, which you have before you, with "Good Old Army" music?

A. Well, here you find the same situation that you have with regard to "Blacksmith Blues" and "Waitin' For My Baby", [207] if I may bring that in, by which I mean that, you see, in "Waitin' For My Baby", you have, after your upbeat—I will play—I will transpose them in the same key as the Charlier exercise—it goes like this (Witness plays on piano). Now, to begin with you have got this B-flat which does not occur in the Charlier, in which this key goes (Witness plays on piano). That note is different, (Witness plays on piano) in "Waitin' For My Baby" and in "Waitin' For My Baby" you have a two-bar phrase, as I said, which goes like this (Witness plays on piano); in other words, you have bars 1 and 2 and an answer in 3 and 4; whereas, in Charlier you have a bar 1 and an answer in bar 2, a bar 3 and an answer in bar 4; in other words, it is 1, 2, 1, answer 2, 3, answer 4; whereas, in "Waitin' For My Baby" you have the same general idea but it does not have this natural note. It has a flat note, as its fifth note, and it also takes two bars to answer itself, the answers in bars 3 and 4.

Q. Have you heard musicians play selections such as these exercises?

A. Well, all musicians do; they all have books of exercise like this. This one happens to be a trumpet one for articulation, which means to teach a

(Testimony of David Raksin.)

brass player when he should slur a note and when to tongue a note.

Q. Have you heard a musician jazz up one of these [208] exercises?

A. Yes. Not if his teacher is in sight. I have heard it.

Mr. Wolff: No further questions.

### Cross-Examination

By Mr. Hoppe:

Q. Do you want to stay there, please. Mr. Raksin?

The Witness: Yes, sir.

Q. (By Mr. Hoppe): Now, I would like to get to the difference in the style of music, first.

Now, as I understood your testimony, the statement in "Waitin' For My Baby" is two bars long and the statement is in bars 1 and 2, is it not, and in bars 9 and 10, if you look?

A. Yes. I think I will just check. Yes, I know it, but I just wanted to make sure.

Q. Yes. And then the statement is in bars 25 and 26?

The Court: A little louder, Mr. Hoppe.

Q. (By Mr. Hoppe): And then the statement is in bars 25 and 26?

A. Bars 25 and 26; 25 and 26, right.

Q. And so we always have a statement that is two bars long and they are spaced at odd intervals?

(Testimony of David Raksin.)

A. Well, they are spaced at appropriate intervals.

Q. Now, in "Blacksmith Blues" the statements are in bars [209] 1, 3, 5, 7, 9, 11 and 13, is that right? A. 1, 3, 5, 7, 9, 11 and 13, yes.

Q. And 15?

A. And 15, somewhat different.

Q. But it is a statement?

A. Well, yes. It is like a little coda, the ending.

Q. Now, you used the expression that in that trumpet solo one of the statements was modulated. What does that mean to a musician?

A. That means that the key changes; in other words, originally it started out, let's say the trumpet starts out on this key (Witness plays on piano); then it goes to here (Witness plays on piano), like that. Now, that is called the dominant of the original key. The original key is this (Witness plays on piano). The dominant is C (Witness plays on piano), in other words, it changes to the key of C, and it is based upon chords. As Mr. Schneider pointed out, it is like this, it is based upon a triad with a passing tone. The first triad is in the key of F (Witness plays on piano). The next one goes to the chord of C (Witness plays on piano).

Q. Now, to the listener, when the tone is modulated does it have the same physical manifestation to the ear and to the mind?

A. It does not. [210]

Q. It does not? A. It changes.

Q. It changes, but does the relationship of the

(Testimony of David Raksin.)

notes within the modulated phrase usually remain the same as the notes in the first phrase?

A. It does not, usually; but sometimes it does. If you wish, I can illustrate how the same notes can be completely different in another key, I mean in a song, the same notes.

Q. Yes.

A. There is a very, very famous song called, "The Man I Love", and it consists of the same notes and these notes are different every time because the key changes; it starts like this (Witness plays on piano). Now, the first three bars are the same notes, once he repeats a note, but these are considered by musicians to be absolutely different; although they are the same notes, the chord modulates. Here you have a thing where the same notes are considered different notes. The reason for this, if I can say without getting involved musicianly is that when you play it this way (Witness plays piano), it doesn't mean the same thing as when you go (Witness plays piano). This is a minor chord (Witness playing on piano). Then you go to another minor chord (Witness playing on piano). Of course, then you modulate and you [211] play the notes down to only one tone and it is completely different (Witness plays piano); again it is the same notes (Witness plays piano); they are different each time; again the same notes transposed down to one and they are completely different.

Q. That is to the musician, to the expert?

A. No. It is to people who hear them. I can't

(Testimony of David Raksin.)

presume to say what people hear, but I know that if this thing was the same all the time, it would be like this (Witness plays on piano), you see, like that. Now, I played it several times. Can you see those?

Q. Yes, I can see you got the mock piece the second time. A. Precisely.

Q. And the other time you put a little variation in it?

A. No. What you did was actually change the music that the music develops.

Q. Now, will you please play all of the statement notes, I mean bars of "Waitin' For My Baby", which are 1, 2, 9, 10, 25 and 26?

A. (The witness plays piano.) I am sorry. I want to make sure. There is one different note. I will start again, if I may, at bar 1.

Q. All right. Bar 1.

A. (Witness plays on piano.) That is bar 1 and 2. Now, we come to—— [212]

Q. 9 and 10?

A. (The witness plays piano.) There is a wrong note in here which belongs in a previous bar, and that is one of the things that was copied down. What was obviously meant, if I may presume, is not this beat like it should be on the downie (Witness plays on piano). I imagine that your client would agree that it is not meant to sound like this with two on the beat (Witness plays on piano). In other words, it would be "Let's Go Find a Parson, to Change

(Testimony of David Raksin.)

Your Name to Carson" (Illustrating), so they are roughly the same. There is an extra note.

Q. Now, would you please do 25 and 26?

A. (The witness plays piano.)

Q. Now, those are all of the statements of "Waitin' For My Baby", are they not?

A. That is right.

Q. Now I would like to have you play the statements from "The Blacksmith Blues", which are 1, 3, 5, 7, 9, 11, 13 and 15?

A. (Witness plays on piano), that is bar 1. Bar 3: (Witness plays on piano). Now, bar 5: (The witness plays on piano). Now, bar 7: (Witness plays on piano). You said 9?

Q. 9?

A. 9 (Witness plays on piano). Bar 11: (Witness plays on piano). [213] Bar 13——

Q. 13?

A. (The witness plays on piano.)

And bar 15 (witness plays on piano).

Q. Now, in the group of statements you have just played, those are all the statements of "The Blacksmith Blues," is that correct?

A. Precisely.

Q. Now, in the statements of bars 1, 3, 9, 11, you have your natural statement, is that right, the one in the original key of the song?

A. That is right, 1, 3——

Q. 9? A. Yes, 9, 11. That is right.

Q. And the statements of 5, 7——

A. 5, 7——

(Testimony of David Raksin.)

Q. —13 and 15—

A. —13 and 15 are the ones—

Q. —are modulated?

A. —in the modulated statements.

Q. Now, in all of the statements of “Waitin’ for My Baby,” the first tone is the two-note tone, is it not? A. That is right.

Q. And it consists of a dotted eighth and a sixteenth? A. Quite right. [214]

Q. That is true in each of them, is it not?

A. It is so.

Q. Now, in—

The Witness: Well, wait a minute.

Q. (By Mr. Hoppe): The first?

A. The first bar, you mean?

Q. Yes; the first. A. Bar 1.

Q. Bar 2?

A. No; not bar 2. Bar 2 is different.

Q. Is bar 2 different?

A. Yes. You see (witness indicates on sheet music).

Q. Oh, let me get the other piece of music then.

Mr. Rudin: What music do you intend to put in, counsel?

Mr. Hoppe: I want to refer to the “Good Old Army.”

Mr. Rudin: You are going to use the copyrighted version, are you not?

Mr. Hoppe: I am going to use both the copyrighted version and the version that was published—I mean distributed.



(Testimony of David Raksin.)

Mr. Rudin: Well, your Honor, to the extent that he uses anything but the copyrighted version, we have objection.

The Court: All right.

Q. (By Mr. Hoppe): I would like to call your attention to "Good Old Army" in the version which is Plaintiff's Exhibit 1 and the version which is Plaintiff's Exhibit 3. [215]

A. All right.

Q. Now, referring to Plaintiff's Exhibits 2 and 3 and to "The Blacksmith Blues," is it not true that in bars 1, 2, 9, 10, 25 and 26 the first tone of the statement comprises two notes having the same tonal depth, the same tonal quality let us say, and the timing of a dotted eighth and a sixteenth?

A. Quite right. Let me just check this, but I am sure it is the same.

Mr. Wolff: Will the reporter read that question?

(Record read by the reporter.)

The Court: And the answer was "Quite right."

Mr. Hoppe: Yes, that is as I understood the answer.

The Court: We will stop and take the morning recess at this time.

(Recess.)

The Court: All right, go right ahead. Do you want him back at the piano?

Mr. Hoppe: Yes, sir, if you please. No. I think he can take the stand.

(Testimony of David Raksin.)

The Court: Go right ahead.

Q. (By Mr. Hoppe): Now, Mr. Raksin, my notes indicate that I should have asked you this question. I will see if I did. I think we may have covered it, but I don't know, and that is, in bars 1, 2, 9, 10, 25 and 26 of Plaintiff's [216] Exhibits 2 and 3, the first note or first tone, let us say, of the question comprises two notes, the first having a value of a dotted eighth and the second having the same tone and the value of a sixteenth, is that correct? A. That is correct.

Q. Now, that same thing is true, is it not, of bars—I am going to call your attention to “The Blacksmith Blues”—of bars 1, 3, 5, 7, 11 and 15 of “The Blacksmith Blues,” is that correct?

A. Yes, it's also true of the Mozart Symphony and the Ganne piece and about thirty others I can point to.

Q. I will get to that later and ask for your best evidence on that particular point. Right now we are discussing the alleged infringement and the Plaintiff's pieces of music.

Mr. Hoppe: I move that the volunteered part of his answer be stricken.

The Court: It may go out.

Q. (By Mr. Hoppe): Now, with reference to bars 1 and 2 of Plaintiff's Exhibits 2 and 3, the second tone comprises two notes having the same tonal quality but having a timing of a dotted eighth and a sixteenth, is that correct?

A. That is correct.

(Testimony of David Raksin.)

Q. And that is likewise true in "The Blacksmith Blues," is it not, of bars 1, 2—no—bars 1, 3, 5, 11 and 13? [217]

Mr. Rudin: What is 2, Mr. Hoppe? Will you read that question?

The Witness: Will you please give me the bars again?

Mr. Hoppe: Do you understand the question?

The Witness: I did, but the last part of it I missed.

Mr. Rudin: Have the reporter read the question and I will have the benefit of it, too.

(Pending question read by the reporter as follows:

"And that is likewise true in "The Blacksmith Blues," is it not, of bars 1, 3, 5, 11 and 13"?)

Mr. Rudin: What is "likewise true"?

Mr. Hoppe: Will you please strike the question, Mr. Reporter.

Q. And it is likewise true in "The Blacksmith Blues" that in each question contained in bars 1—let me finish the whole question—bars 1, 3, 5, 9, 11 and 13, that the second tone comprises two notes having the same tonal quality, the first note having a length of a dotted eighth and the second note a length of a sixteenth? A. Yes; it is true.

Q. Now, what did you call the fifth note in Plaintiff's Exhibits 1 and 2 of bars—I mean Plaintiff's Exhibits 2 and 3—bars 1 and 2, the note that

(Testimony of David Raksin.)

connects the mi part with the sol part, what kind of a note did you call that?

A. That is called a passing note. It is the fourth of the [218] scale in the Plaintiff's exhibits—the fourth, the natural fourth.

Q. Yes. Now, in Plaintiff's Exhibits 2 and 3, the fifth note is the passing note as set forth in bars 1 and 2? A. That is right.

Q. And in bars 9 and 10, the fourth note is the passing note, is that right?

A. Quite right. It is right.

Q. And in bars 25 and 26 the fourth note is the passing note? A. That is right.

Q. Now, in each of the passing notes, the passing note of bars 1, 2, 9, 10, 25 and 26 has a value of  $\frac{1}{8}$ th, is that right?

The Witness: You are now speaking of "Blacksmith Blues" or——

Q. (By Mr. Hoppe): I am speaking of Plaintiff's Exhibits 2 and 3.

A. Oh, "Gold Old Army" and—yes, "Good Old Army" has the value of an eighth note.

Q. And in "Blacksmith Blues" the passing note has a value of  $\frac{1}{8}$ th in bars 1, 3, 5, 9, 11——

A. 1, 3——

Q. 3—— A. ——5, 9, yes.

Q. ——5, 9—— [219] A. 9.

Q. ——11—— A. 11.

Q. ——13—— A. 13.

Q. ——is that not correct?

A. That is correct.

(Testimony of David Raksin.)

Q. Now, what is the note following the passing note, what do you call that?

A. That is the fifth of the scale——

Q. That is the——

A. ——the sol; the fifth of the scale.

Q. All right. Now, in “Good Old Army,” Plaintiff’s Exhibits 2 and 3, the passing note is a quarter note, is that correct?

A. No, no. I think you mean that the next note is a quarter note. The passing note, you have already established that is an eighth.

Q. No. The note following the passing note?

A. Is a quarter.

Q. Is a quarter in bars 1, 2, 10 and 26?

A. 10 and 26. I know where it is now. Yes. In bar 26. Quite right.

Mr. Rudin: Your Honor, I make the same objection. As to Mr. Schneider, you overruled it, but I think it is [220] an imposition upon the court and upon counsel for the counsel to just simply take something and ask the witness to identify what is here and what is there. If he is trying to educate himself or if he has a hypothetical question he wants to ask, let him ask it, but he seems to be building up for 20 minutes, for what purpose I don’t know, excepting to say the same thing is here in bar 1 and as in bar 10, and this could go on, unless we had an IBM machine, for days.

The Court: Well, I will let him finish, Mr. Rudin. I imagine he is about finished.

(Testimony of David Raksin.)

Mr. Hoppe: This will only take about 15 minutes, your Honor.

The Court: All right.

Mr. Hoppe: I believe that they are points which will be very important in final argument.

The Court: All right; go right ahead.

Mr. Rudin: It is purely argumentative.

The Court: I will let him finish his point.

Mr. Ruiz: The point is, obviously, in urging the same objection, to indicate that there are four beats to a bar and so many quarter notes to a bar, and we are getting no further than simply trying to make up a mathematical computation, which is mathematics, and if we could stipulate in any way to shorten this fifteen minutes and help him [221] in his argument, I think we can do that.

Mr. Hoppe: I don't think we can, your Honor. I can't very well do that.

The Court: Well, he said he can't, and he wants to get it for his argument. I will overrule the objection. Go ahead.

Make it as brief as you can.

Mr. Hoppe: I will, your Honor. I believe it is very important.

The Court: All right. Go right ahead.

Mr. Hoppe: Will you repeat the question, Mr. Reporter?

(Question read by the reporter as follows: "Now, in 'Good Old Army,' Plaintiff's Exhibits 2 and 3, the passing note is a quarter note, is that correct?")

(Testimony of David Raksin.)

The Witness: No. We changed that.

Q. (By Mr. Hoppe): No. This is in the note following the passing note, the note is a quarter note?

(Record read by the reporter as follows:

“The note following the passing note is a quarter in bars 1, 2, 10 and 26?”)

The Witness: The answer was yes.

Q. (By Mr. Hoppe): Now, in “The Blacksmith Blues,” the note following the passing note is a quarter note in bars 1, 7, 9 and 13, is that correct?

A. 1, 7, 9 and 13—it is so in 1, 9 and 13, and it is not so in bar 7. [222]

Q. Which is the passing note in bar 7?

A. The passing note, if anything, is—there is no passing note in that bar, because the chords change. There is an A-flat in it, but the A-flat is now a regular note of the chord which is changed to B-flat seventh.

Q. Now, in bar 13 the passing note is connected to the note following the passing note—this is in bar 13 of “Blacksmith Blues”—by some form of indicia. What is that indicia?

A. That is a slur.

Q. And referring to Plaintiff’s Exhibits 2 and 3, in bars 10 and 26 there is likewise a slur connecting the passing note with the note following the passing note?

A. Would you please repeat those bar numbers?

(Testimony of David Raksin.)

Q. 10 and 26.

A. 10 and 26. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10. I would like to say here that this slur is a completely different thing in these bars, because it's the slur in the bars of which you speak, in "Good Old Army," 1, 2, 3, 4, 5, 6, 7, 8, 9, it's in 9 and 10 and a couple of other places.

Q. 25 and 26?

A. Yes, it is certainly there, but the purpose of it is completely different. In the case of "Good Old Army" it's the kind of slur which allows one note to be sung—one word to be sung with two notes; in other words, it says "Marchin' a-long, a-long, Sing-in' a song"; whereas, in the "Blacksmith [223] Blues" the purpose of this slur is just a slur and there are two syllables, it says, "Folks love the rhythm, rhythm," in other words, the passing note is connected to the fifth by a slur, but that slur is completely different because there are two syllables on it, and the same goes for the next bar, "clang bang-in rhythm."

Q. But the slur is there in both cases?

A. The slur is there, but it is two different things, completely different things.

Q. Would you sing those slurs in say just bar 26 of "Blacksmith Blues"—or "Good Old Army"?

A. Bar 26, bar 26 of "Good Old Army"?

Q. Yes.

A. Well, I will count them: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26. There isn't a slur here.



(Testimony of David Raksin.)

Q. On 10? Is there a slur on 10?

A. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10. Yes, I cited it. "Sing-in', Sing-in' a Song"—

Q. Now, would you do it on bar 13 of "Blacksmith Blues"?

A. 13 of "Blacksmith Blues." 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13. "Folks love the rhythm." Two different syllables.

Q. Thank you.

Now, with reference to having the first tone [224] comprising in this question a dotted eighth and a sixteenth, both having the same tone value, but that different time value, in any of the exemplars which you have chosen as being in the public domain, do you find that precise timing, not the equivalent, but the precise timing of a dotted eighth and a sixteenth?

A. I have already said that as a musician we do not recognize any difference in audibility between a sixteenth and a 32nd, except at so slow a tempo that you couldn't play either of these pieces. Consequently, the Ganne one has a 32nd and this one has a sixteenth. They are to all intents and purposes the same. I can also demonstrate on the blackboard that certain other examples I have given are the same, exactly insofar as hearing goes. When in alla breve time, which Mr. Schneider called cut time yesterday, there appear in this sequence a dotted quarter and an eighth, in alla breve time which is a C with a line

(Testimony of David Raksin.)

through it. That is the same thing as a dotted eighth and a sixteenth, exactly, and there are examples.

Q. Now, would you say, outside of what is the same, and do you have—and I want a precise answer to this question and not an answer as to equivalents or what is the same to a musician, but I want it in black and white on some sheet music—do you know of any sheet music that [225] you have brought in court here in any of these books in which there is precisely shown on the first note a dotted eighth and a sixteenth?

Mr. Rudin: Your Honor, I object to that question as having been asked and answered and it is argumentative.

Mr. Hoppe: It has not been answered.

Mr. Rudin: May I complete the objection.

Mr. Hoppe: Yes, you may.

Mr. Rudin: It has been asked and answered. He just asked precisely the same question. The witness answered it in the only terms in which he could answer it as a musician. It is argumentative and there is no reason to impose upon an expert's time. It is argumentative cross-examination which doesn't come under cross-examination.

The Court: I will overrule the objection. You may answer.

The Witness: May I make my answer this way——

The Court: Yes.

(Testimony of David Raksin.)

The Witness: And then I will answer it any way you choose.

The Court: All right. Go ahead.

A. Let me say "oeuf" and "enough," or "huff" and "enough." Huff is spelled h-u-f-f. Enough is spelled e-n-o-u-g-h. And I defy anybody to tell the difference between "oeuf" and "huff" and "o-u-g-h" and "enough." They are the same thing. And o-e-u-f is French, oeuf, ough as we say it. These are the same things. Now, [226] there is among these examples an addition which I have made to Mr. Barlow's work to show how "When the Saints Go Marching In" is played, it is played exactly as you have said, and I have taken—I recognize I am under oath—I have written down there that it is played (Humming), like that (Witness hums). The fourth note is sometimes not played as dotted eighth and sixteenth, so I haven't taken the liberty of doing that, but the other one always is, the first four notes (witness hums), in other words, the E-flat and the G. Bands play it, that is how they play it, and I put my honesty behind it such as it is.

Q. (By Mr. Hoppe): I am not questioning that. What I am trying to find out is if in this published article that you have there—these books that you have, whether anyone has used this identical spelling, as you call it, of a dotted eighth and a sixteenth for the first note of the question?

Mr. Rudin: Your Honor, I am not aware that

(Testimony of David Raksin.)

the plaintiff is making any claim of originality of the methods of the musical spelling of notations. He has a copyright infringement action. I submit this type of kind of IBM approach to music isn't proper.

The Court: Well, Mr. Rudin, I will let him finish. I imagine he is about through. I will overrule the objection. [227]

A. Insofar as literal notation, exact notation goes, there is no exact duplication, but I say that insofar hearing goes there is no difference.

Mr. Hoppe: I move to strike the rest of the answer.

Mr. Rudin: You can't strike part of an answer by an expert who gives an expert answer.

The Court: I will let it remain. I will deny the motion to strike.

Q. (By Mr. Hoppe): Now, with reference to the second tone of the question, do you have any art, that you have there, any of the prior publications which you have charted, which literally and precisely have a dotted eighth and the sixteenth combined to make up the tone?

A. I would like to have the examples, if I may.

(Document handed to the witness.)

Well, I see one immediately. This example is Gluck who died in 1787, "Ipheginia en Touride." There it is, right there (Indicating in Exhibit E).

Q. Now, would you please go to your source

(Testimony of David Raksin.)

material and show us where that is in your source material?

A. All right. Would you like to see that a minute? Gluck's "Ipheginia en Touride." I presume this is what it is in reference to. (The witness refers to book.) Right here, right there (Indicating in book). [228] That is the third of the scale, C-sharp, and this key which is key of A-major, a G-natural, and the key of E-flat which is the key in the exhibit of "Good Old Army"—which exhibit is this one here—Exhibit 3, it is in E-flat and the second note, the third of the scale is designated as G-natural in this key which is A-major, third of the scale is C-sharp, and it is exact form, those two notes.

Q. And do they have the same quality?

A. The same quality, the same key, the same chord behind them and the same value.

Q. Now, this book was copyrighted in 1950?

A. Yes.

Q. Do you have anything here that was published prior to 1950 showing that tonal arrangement?

Mr. Rudin: Your Honor, I object to this type of cross-examination which misleads the Court and attempts to mislead the witness, and counsel knows better than that. That book is a compilation of classical works of music.

The Witness: The composer died in 1787.

The Court: Yes. I will sustain the objection.

(Testimony of David Raksin.)

Mr. Hoppe: Well, your Honor, I submit—I am going to ask one question to make my point.

Q. Do you know that the compiler of this book compared page 130 with the original? [229]

A. I am certain he could not have written it in any way than to compare it with a printed version. I am sure the original is not available, but this is the standard work used in copyright.

Mr. Hoppe: May I ask the question, your Honor, under Rule 43?

The Court: All right.

Q. (By Mr. Hoppe): This book was Copyrighted in 1950, was it not?

A. Yes; so it says.

Q. Yes. Do you have any work here that was published prior to 1941 containing that note arrangement?

A. Now, this—let me see—I am not qualified to pass on admissibility, out the lower eighth notes here, there is the second one of “When the Saints Go Marching In,” which is an old Spiritual, and which has been played dozens of times, copyrighted in various of arrangements by numbers of people, employing this thing.

Mr. Hoppe: Now, are we still under Rule 43, your Honor?

The Court: All right.

Q. (By Mr. Hoppe): Do you have with you any publication prior to 1941 having the note arrangement shown on your chart here on line 8?

Mr. Rudin: Your Honor, I understand this

(Testimony of David Raksin.)

question of [230] impeaching a witness. This man is an expert who knows music. He can read music. He has testified from his own knowledge. And counsel seems to take it as a magical thing that you have to have it printed in some book prior to 1941 in order for it to be in the public domain.

The Court: I will overrule the objection. You can make that argument for the purpose of the record. Let us finish with him.

The Witness: In other words, you want to know——

The Court: Are you about finished with him, Mr. Hoppe?

Mr. Hoppe: It will take me about ten minutes, your Honor.

The Court: All right. Go ahead.

A. I don't have any work here which has been printed. I have a compilation of works dated before that date.

Mr. Ruiz: If the Court please, we will stipulate that we don't have any works that are printed, if he is going to take ten minutes on this; and even if the original compositions were produced, if we were going to cross-examine further we would have to have the dead man here to say, "This is what I wrote down," in this type of cross-examination.

Mr. Rudin: We are willing to go to the Public Library, if that is what he wants, and drag out some of the Gluck [231] things, which he may find in some old editions, but when a man has died in

(Testimony of David Raksin.)

1787, to ask us to find an original manuscript, that would be asking too much.

The Court: I know.

Mr. Hoppe: Your Honor, we are not asking for the original manuscript to be produced.

The Court: Let us go ahead and finish. We are trying to get through.

Q. (By Mr. Hoppe): Now, in the work that you just called my attention to, the second note of the question is the first note of the bar, is it not, and it is not the second note of the bar?

A. It is indeed the second note—the first note of bar. I beg your pardon. It is the first note of the bar in the Gluck.

Q. And the prior note prior to that is located in the immediate prior bar and it is a single note, is it not?

A. It is a single note. It is called a pickup.

Q. Now, the works that you have brought here to authenticate your chart, one is a book published in 1950, Copyrighted in 1950; what was the date of the copyright of the other one, if you please?

A. 1948.

Mr. Hoppe: Now, one more question and I think we will be [232] through here.

Q. Do you have in the art that you have charged on your chart an example in which there is a slur between the passing note and the note following the passing note, any kind of a slur?

A. I am sorry to say that I have not copied down the slurs, for the very simple reason that



(Testimony of David Raksin.)

very rarely would a compiler, except in the case of vocal art, do such a thing. In other words, there I didn't bother with the slurs. I just wrote down the notes. And slurs must exist according to the law of averages. I just didn't bother with them. In fact, it is impossible to write music without having them. There is one slur here which goes to the following passing note, right here in the Brahms, a German requiem, a very famous piece; in fact, there are two, right there (Indicating) is a slur (witness singing): "How Lovely Is That Dwelling Place"——

Q. Now, in that particular piece that you have pointed out, the first note of the question is a half note, is it not?

A. You mean this (Indicating)?

Q. Here is the passing note (Indicating). What is that, a quarter note?

A. Now, look, the passing note is either this (Indicating) or this (Indicating) depending on what key it is in. [233] It is one of these three (Indicating). Now, these two notes (Indicating) are connected. This is a passing note (Indicating), C-sharp is a passing note. The B-natural is a passing note. The B-natural and the C-sharp are connected by a slur. And here (Indicating) is a passing note, an F-sharp, in the key of E—an F-natural in a key of E-flat.

Q. All right. Now let us compare this with the music that we are talking about in this lawsuit. In this Brahms piece of music, the note that you say compares to our first note is given as, what is that?

(Testimony of David Raksin.)

A. No. This is the note that compares with B-flat.

Q. Let us compare working notes. In Brahms, where is the note that corresponds to your work?

A. I don't think he wrote anything in his whole life.

Q. Well, this tone?

A. You mean the first note of the piece?

Q. Yes. A. Right here (indicating).

Q. And what value is that?

A. That is a quarter note.

Q. Compared to a dotted eighth and——

A. And a sixteenth.

Q. ——and the sixteenth of the plaintiff's music?

A. The same value of duration, by the [234] way.

Q. Now, the second note——

A. ——is a G, the same note or notes.

Q. Yes. What is its value here?

A. A half note.

Q. And what is the value in the plaintiff's piece of music?

A. A dotted eighth and sixteenth.

Q. And the third note in the plaintiff's piece of music is the passing note? A. That is right.

Q. What is the third note in this piece of music?

A. It is A-flat, the same note—wait a minute. The third note in the plaintiff's piece of music is G-natural. I beg your pardon. You mean the third real note, without repeating——

Q. Yes.

(Testimony of David Raksin.)

A. Is an A-flat; and there is an A-flat here (indicating), too, in Brahms.

Q. And would that be the passing note in Brahms?

A. Well, it is a passing note, if you are in E-flat. In other words, I am not trying to dodge your question. I don't know for sure. If this key changes here to an eighth—to a B-flat seventh, which it may do, this is not a passing note, but if it is in a key of E-flat, which it may very well be, it is indeed a passing note. [235]

Q. Now, the passing note, then, in Brahms is not connected with the following passing note, there is not a slur there?

A. For all I know, this (indicating) may be a passing note, or this (indicating), I can't say, but this note, this is an E-flat chord (indicating) for sure. Then that makes C a passing note, because that is not in the chord of B-flat. Then the B-flat, which is the fifth of the scale, is connected with the sixth, which is a C-natural, by a slur. The significance of this does not exist in music.

Q. Well, let us get on to spelling again, sir, and that is, there is no slur, is there, between what you would call the first, the second, the third note of the combination and the fourth note in Brahms, is that correct; the slur is between the fourth and the **fifth notes**?

A. One, two, three, four, five—it is between the fourth and fifth notes, quite right; and here (indicat-

(Testimony of David Raksin.)

ing), it is between the—one, two, three, four—fourth and fifth notes.

Q. Now, using your same language, that these two notes in bar 9 are one note or one tone, is that it?

A. Yes, but you have been spending all this time trying to prove that they are really not one; that they are (witness hums) like that. A dotted eight and a sixteenth [236] you can't suddenly change and say, "Now they are one note."

Q. Well, now, if you will follow your principle of music design, that the spelling of this is one note, two notes, three notes and four notes, and I am going to use your spelling now, there is a slur between the third and the fourth notes in "Good Old Army," is there not?

A. I cannot permit that. It is the same tone, it is the same tone but it is not the same note. In other words, if you are going to try to trip my evidence on the basis that these are the same things, that an E-flat, that since I can't give you an exact sixteenth and 32nd, then you can't suddenly come and say that a dotted eighth and a sixteenth are the same note just because you want to arrive at the fourth and fifth notes instead of the third and fourth. In other words, on that basis, it is the fourth and fifth notes—one, two, three, four, five. There is your slur; there is your slur.

Mr. Hoppe: No further examination.

The Court: Is that all?

Mr. Hoppe: That is all.

(Testimony of David Raksin.)

The Court: Any questions, Mr. Rudin?

Mr. Rudin: Just a few questions.

The Court: All right.

Redirect Examination

By Mr. Rudin:

Q. On the examples on that exhibit [237] which you have, which you copied out of Barlow and Morgenstern works, Mr. Raksin, are you otherwise familiar with those musical compositions?

A. Yes.

Q. And from your knowledge and memory of those musical compositions, were they properly noted in the Barlow and Morgenstern works?

A. Absolutely.

Mr. Hoppe: I move that the answer be stricken as not being the best evidence, your Honor. It is oral testimony.

The Court: I will let it remain. I will deny the motion to strike.

Q. (By Mr. Rudin): To your knowledge, are any of the original manuscripts available of some of those works of Gluck and Beethoven?

A. Some of them are.

Q. Where?

A. Well, they would be in Germany, they would be in collectors' places. Harvard has some, the Fleischer Collection——

Q. Mr. Raksin, is it also true that Beethoven's works are printed by many publishers, each of them having the right——

A. They are.

(Testimony of David Raksin.)

Q. The same applies to Gluck?

A. Absolutely. [238]

Mr. Rudin: That is all.

The Court: Is that all, Mr. Rudin?

Mr. Rudin: That is all.

The Court: Mr. Wolff, do you have anything?

Mr. Wolff: No.

Mr. Ruiz: Nothing.

The Court: Mr. Ruiz?

Mr. Ruiz: No.

Mr. Hoppe: I have just one more question, your Honor.

The Court: All right, one more.

#### Recross-Examination

By Mr. Hoppe:

Q. Are there compilations such as the books that you have there, that were published prior to 1941 that were available today?

A. With regard to the work of single composers, I think there are, like the Heiden Society was said to have published one and Albert Einstein did one for the Mozart Society, and there was one by Burroughs and Redmond, but I am not sure whether that was before 1941 or afterwards, I can't honestly say.

Q. And even though Beethoven and some of these other people are dead, there have been pieces of their music other than the original manuscripts, which were published prior to 1941, is that correct?

(Testimony of David Raksin.)

A. If you mean they have been printed in different ways. [239]

Q. Yes.           A. Yes.

Mr. Hoppe: That is all.

Mr. Rudin: That is all.

Mr. Wolff: May I ask the witness a few questions?

The Court: All right.

### Redirect Examination

By Mr. Wolff:

Q. (Mr. Raksin, would you now again seat yourself at the piano, and I will ask you, sir, whether the dotted eighth and sixteenth rhythm which appears in the first two bars of "Good Old Army" is an unusual rhythm musically?

A. Well, I have a number of examples here which I have played. Shall I play a couple of them again?

Mr. Wolff: Sure.

The Court: Well, we have heard that. Must we have it again?

Q. (By Mr. Wolff): Let us confine our consideration of this rhythm as jazz rhythm, popular music, are there any types of jazz rhythms that employ this dotted eighth and sixteenth?

A. Yes. There is a very famous one. It dates way back to vaudeville days. It is called a Shuffle, but it goes way back. It goes like this (witness plays on piano); they go like this (witness plays piano). Then [240] there is a Boogie Woogie beat.

(Testimony of David Raksin.)

Q. Rather than the Boogie Woogie, may I just ask you, the first example, it is played (humming): "Oom-pah, oom-pah, oom-pah," if that were written in music, could that be written in a dotted eighth and a sixteenth note and correctly represent the rhythmic pattern that you have played?

Mr. Hoppe: I object to the question.

A. That is exactly how it is written.

The Court: Well, I will overrule the objection. What is your answer?

A. It is exactly the way it is written, precisely the way it is written.

The Court: All right.

Mr. Wolff: That is all.

The Court: He said that is all, Mr. Hoppe. Do you have anything more? Your client is right there. Maybe she wants to have you ask a question.

Mr. Ruiz: I will have one question to ask.

The Court: All right.

### Redirect Examination

By Mr. Ruiz:

Q. Will you play a Boogie Woogie with a dotted eighth and sixteenth?

A. Yes. You play it in different ways, but a Boogie Woogie rhythm would be like this (witness plays on piano).

Mr. Ruiz: That is enough. [241]

The Court: That is all, Mr. Ruiz?

Mr. Ruiz: That is all.



(Testimony of David Raksin.)

The Court: Is that all, Mr. Hoppe?

Mr. Hoppe: That is all.

The Court: All right. The witness may be excused.

Mr. Wolff: Yes. And, your Honor, the piano will be removed.

The Court: Yes. All right. How many other witnesses do you have? That is all (addressing Mr. Raksin); you may be excused. Thank you.

Mr. Rudin: I would like to cross-examine the plaintiff again, as part of our defense, on the question of laches, briefly.

The Court: Do you think we ought to start at 1:30 rather than at 2:00 o'clock? What is your thought on that?

Mr. Rudin: I think at 1:30 would be best. We are pretty positive of finishing today.

The Court: Yes. Well, shall we make it 1:30?

Mr. Hoppe: Fine, your Honor. May I ask your Honor a question before we recess?

The Court: Certainly.

Mr. Hoppe: I would like to find out what your Honor's wishes are on oral arguments, whether they are to be now or at some other time, or by briefing? The reason for that is that if I can get away from here today, I have some [242] depositions I can take.

The Court: Why don't we do this: We will see how we get through this afternoon and if we have time for oral arguments, we will have them to accommodate you, and if we don't we will have them

on written memoranda. If we get through in time we will have some oral arguments this afternoon. If we don't, we will just have them on written memoranda. Is that satisfactory?

Mr. Hoppe: That is satisfactory.

The Court: Is that satisfactory to everybody here?

Mr. Ruiz: Yes.

Mr. Rudin: We can make short statements.

The Court: You say yes. We will see how we get along. We will start at 1:30.

(And, thereupon, at 11:55 a.m. on Thursday, September 19th, 1957, a recess was taken until 1:30 p.m. of the same day, Thursday, September 19, 1957.) [243]

Thursday, September 19, 1957—1:30 P.M.

The Court: All right. Mr. Wolff and Mr. Ruiz, who is going to be the witness?

Mr. Rudin: The next witness, we will call, as an adverse witness, the plaintiff in this action.

The Court: All right.

Mr. Fisher: (The Clerk): She has been sworn.

Mr. Rudin: She has been previously sworn.

The Court: Yes; she has been sworn.

MILDRED BECKER SCHULTZ

the plaintiff herein, called as a witness by the Defendants under the provisions of Rule 43(b) of the Rules of Civil Procedure, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rudin:

Q. Mrs. Schultz, you testified that somewhere in the summer, and you weren't sure about the date——

A. That is right.

Q. ——of 1952 that you first heard "The Blacksmith Blues" on television on Sid Caesar's, is that correct?

A. Yes, sir, that is right.

Q. And you also testified that thereafter you consulted an attorney in connection with your claim of infringement, is that right? [244]

A. That is right, sir.

Q. Do you recall the name of that attorney?

A. Mr. Paul McCarthy.

Q. And did Mr. McCarthy take any action on your behalf that you know of?

A. Not that I know of, other than to advise me to go and see Mr. George B. White.

Q. And how long after you saw Mr. McCarthy did you see Mr. White?

A. Well, as I recall at this moment, it must have been as soon as I could get up to San Francisco.

Q. In other words, a period of a week or two weeks?

(Testimony of Mildred Becker Schultz.)

A. No, sir. A period of maybe a day or so.

Q. In just a day or so; and then did Mr. White take any action on your behalf?

A. Well, first he took it under consideration to see, to examine the case, and then he offered me a contract in order to handle the case, but I think——

Q. Well, I don't want to get into relations between you and Mr. White. I want to find out when was the first time he took any action on your behalf?

A. Well, when he sent out a notification of an infringement.

Mr. Hoppe: We have the letter here, Mr. Counsel.

Mr. Rudin: Yes. Will you produce the [245] letter?

Mr. Hoppe: Yes.

Mr. Rudin: Thank you.

Q. Do you recall how long that was after you first consulted Mr. White?

A. My best recollection at this moment is that it was in a period of weeks.

Q. In other words, if we said that all of this took place within, say, about a month after you heard the song, that would be giving it a liberal period of time?

A. Well, as far as going to Mr. White, it was a period of days, but——

Q. I mean, from the time you heard the song until the time he sent the letter out claiming infringement, was that at best a month?

(Testimony of Mildred Becker Schultz.)

A. I don't recall the exact amount of time, but I was surprised that attorneys do look into things thoroughly before they take any action.

Q. That is not what I am trying to get at. I am trying to get at the time period. I know that you can't be exact about it. I am trying to find out whether it was a month, or six months, or six days, from the time you heard the song until the time he sent the letter out?

A. Well, it wouldn't be six days, I am sure.

Q. It would be closer to a month?

A. I am not sure how long a period of time passed before [246] he sent out that notification of infringement.

Q. Would it be six months?

A. Oh, no, sir.

Q. Three months?                      A. No, sir.

Q. Two months?

A. It wasn't two months, I am sure.

Q. About a month?

A. Approximately, at this time as best I can recall, it would be about a month.

Mr. Rudin: Do you have that letter, Mr. Hoppe?

(Mr. Hoppe hands document to Mr. Rudin.)

Mr. Rudin: I have a letter here from Mr. George B. White, addressed to Hill and Range Songs, Inc., Beverly Hills, California, and ask, do you represent to me and will we agree that this is the first letter sent out by Mr. White? Rather, it is a facsimile copy?

Mr. Hoppe: That is what we believe.

(Testimony of Mildred Becker Schultz.)

Mr. Rudin: And as a photostat of an original sent out, we ask that this be marked.

The Clerk: Defendants' G, next in order.

Mr. Rudin: Defendants' G.

The Court: All right.

(Said document was marked as Defendants' Exhibit G.) [247]

Q. (By Mr. Rudin): It is a letter, Mrs. Schultz, dated November 17, 1952. I would like to have you read that letter.

The Witness: The letter?

Mr. Rudin: Yes; just to yourself.

(Witness examines said letter.)

A. That is correct.

Q. Now, prior to Mr. White sending that letter, had you consulted with any experts to make a comparison of the songs?

A. I don't know if they were experts or not, but I consulted quite a few musicians.

Q. And who were they?

A. Well, there was the Brown's Music Company in San Carlos. That is one I am sure.

Q. Who is the gentleman there?

A. At this moment, I don't know whether he is Mr. Brown or not. He may be.

Q. He worked at this music store?

A. Well, he has an office in the back of it.

Q. Did he make any comparison sheets for you?

A. No. He looked it over.

(Testimony of Mildred Becker Schultz.)

Q. Did he talk to Mr. White, do you know?

A. No; not that I know of.

Q. Mr. White says, "It appears from the opinion of experts who compared the melody of the song published by you that the theme of the same was plagiarized from the portions marked [248] on the enclosed facsimile copy of my client's copy." Do you know who Mr. White was referring to when he says "experts"?

A. No, sir. I don't know who he took the song to.

Mr. Hoppe: I might tell you, for your information, counsel, that it was his partner.

Mr. Rudin: Are you willing to take the stand?

Mr. Hoppe: No. I am just trying to be helpful.

Q. (By Mr. Rudin): Now, Mrs. Schultz, until the time you heard this song on Sid Caesar's program, "Blacksmith Blues," is it your testimony that you never heard it played in any juke box before?

A. No, sir; I did not.

Q. Did you make any investigation after you heard the song as to how popular it had become?

A. No, sir; I didn't. I heard the song on the television and I ran down to the store for a copy of it, looked at the music and knew that it was my music.

Q. Did you inquire at the music store how long the song had been on the market?

A. Later on, after I became aware of it, I was informed that they had an aquacade at the Sequoia High School to the music and I never even knew about it, I never heard it.

(Testimony of Mildred Becker Schultz.)

Q. When was that acquacade? [249]

A. Some time, I don't know for sure—it was in that summer. Somebody told me. I didn't see it. I heard that it had happened.

Q. Did anybody tell you what recording of this song was the most popular recorded?

A. I believe, as I recall at this moment, that I became aware of it being so popular because I saw it in the Hit Parade.

Q. When did you see it on the Hit Parade?

A. I can't recall the exact time, but remember seeing them use it on Hit Parade.

Q. What Hit Parade was that?

A. Isn't that the Lucky Strike?

Q. Was it on television? A. Yes.

Q. You saw it on television, did you not?

A. Yes, sir; I did.

Q. On the Lucky Strike Hit Parade?

A. At this moment, I recall that it was.

Q. And was it one of the hits being played, or sometimes played standard or an extra, called "Lucky Strike extra"?

A. It wasn't an extra.

Q. It was a hit? A. It was a hit.

Q. It was on the Lucky Strike Hit Parade program? [250] A. That is right.

Q. How often did you see it on that program?

A. I don't recall how many times I saw it on the Hit Parade program, but I have watched it and it is some sort of a film on television where they are



(Testimony of Mildred Becker Schultz.)

striking an anvil in supposedly a blacksmith shop. I have seen it a couple of times I know of.

Q. Was that after the Sid Caesar program?

A. Yes, sir, because I wasn't aware of it until the Sid Caesar program.

Mr. Rudin: Do you have a letter, Mr. Hoppe, dated March 12, 1953, addressed to Hill and Range Songs, Capitol Records, and Tune Town Tunes?

Mr. Hoppe: Yes; I do.

Mr. Rudin: Your Honor, we have a letter addressed to Hill and Range Songs, Capitol Records and Tune Town Tunes, dated March 12, 1953, sent out by Mr. White. Please mark it.

The Court: All right. Mark it.

The Clerk: Defendants' Exhibit H marked.

The Court: H.

(Said document was marked as Defendants' Exhibit H.)

Q. (By Mr. Rudin): Now, between November 17, 1952, and the time of sending Defendants' Exhibit H on about March 12, 1953, do you know what action Mr. White took to enforce your [251] claim?

A. He sent several letters to your office for which I understood, my best recollection at this moment is that he didn't receive any proper answer to it.

Q. When you say our office, whose office are you referring to?      A. Gang, Kopp & Tyre.

Q. Well, neither of these letters are addressed to Gang, Kopp & Tyre that I called your attention

(Testimony of Mildred Becker Schultz.)

to. This is the second letter, to Hill and Range Songs, to Capitol Records and Tune Towne Tunes. Do you know of any correspondence between November, 1952, and March, 1953?

A. Yes; I do. There were several letters, I believe.

Mr. Rudin: Does counsel have them?

Mr. Hoppe: Yes.

Mr. Rudin: May I have them?

Mr. Hoppe: You may. What was the date interval?

Mr. Rudin: November, 1952, and March 12, 1953.

(Mr. Hoppe hands documents to Mr. Rudin.)

Mr. Rudin: Now, these you have handed to me we can treat as one exhibit, if you wish. Here is a letter dated December 4, 1952, to Mr. White from Leo D. Harman, Jr., of Capitol Records.

The Court: Make it one exhibit?

Mr. Rudin: Yes.

The Court: All right. [252]

Mr. Rudin: And Mr. White's reply.

Mr. Hoppe: Yes, if you please.

The Clerk: Defendants' Exhibit I marked.

(Said documents were marked as Defendants' Exhibit I.)

Mr. Rudin: Is there anything else, Mr. Hoppe?

Mr. Hoppe: Between those dates?

Mr. Rudin: Yes, sir.

Mr. Hoppe: No; not that I have here.

(Testimony of Mildred Becker Schultz.)

Mr. Rudin: On the second page of Defendants' Exhibit I is a letter of January 27, 1953, to Capitol Records, Inc.

Mr. Hoppe: I beg your pardon. I do have one more.

Mr. Rudin: I thought there would be one.

Mr. Hoppe: Yes.

Mr. Rudin: Let us have the copy of the letter from Mr. White to Capitol Records, dated November 20, 1952, marked as Defendants' next in order.

The Clerk: Defendants' Exhibit J marked.

(Said document was marked as Defendants' Exhibit J.)

Q. (By Mr. Rudin): So we have, Mrs. Schultz, to cover the sequence of events, a letter of November 20, 1952, to Capitol Records from Mr. White, in which he makes a claim from profits of Capitol Records; the Capitol Records reply, which is a part of Exhibit I, of December 4, 1952, referring [253] Mr. White to Tune Towne Tunes, stating that Tune Towne Tunes licensed the recording and, therefore, the claim should be referred to them; and then Mr. White's reply of January 27, 1953. Is there anything else that you know that Mr. White did between those dates about enforcing your claim?

A. Well, I know he wrote to the Secretary of State to find out if Tune Towne Tunes were a corporation, and he did send me a letter asking me if I recognized some certain names.

Q. I don't want to get into conversation between

(Testimony of Mildred Becker Schultz.)

you and your attorney. There is nothing else you know he did about setting forth your claim to the parties?

A. Well, I know that he wrote letters and waited a period of time to receive an answer. Then he would write another letter and wait a period of time.

Mr. Hoppe: Counsel, I will give you this whole set of correspondence. You may take all of it.

Mr. Rudin: May I have a moment, your Honor?

The Court: Certainly.

(A short intermission.)

Mr. Rudin: They are in reverse chronological order. Well, this isn't the original. I will agree that the original of this copy was a letter sent by the firm of Gang, Kopp & Tyre to Mr. White, dated March 20, 1953, [254] and ask that that be marked as Defendants' Exhibit next in order.

The Court: All right.

The Clerk: It will be Defendants' Exhibit K marked.

(Said document was marked as Defendants' Exhibit K.)

Q. (By Mr. Rudin): Did you ever see this Defendants' Exhibit K before, Mrs. Schultz? Mr. White informed you he had received this letter?

A. Yes; I do recognize it.

Q. And Mr. White informed you that he had received that letter?

A. I believe he sent me a copy of it.

(Testimony of Mildred Becker Schultz.)

Mr. Rudin: I ask that this next letter be admitted as Defendants' Exhibit next in order, a letter from Mr. White to Mr. Norman R. Tyre, dated March 31, 1953, to which is attached some music referred to in the letter.

The Court: All right. It may be received.

Mr. Rudin: In evidence, your Honor?

The Court: Yes; that is right.

(Said document was received in evidence and marked as Defendants' Exhibit L.)

Mr. Rudin: All of these are in evidence, these last few?

The Court: Yes; all of them are received in evidence, [255] Mr. Rudin.

(Said documents, heretofore marked as Defendants' Exhibits G, H, I, J and K, were received in evidence.)

Mr. Rudin: Marked and all admitted in evidence; may we have them all received?

The Court: Yes; received in evidence.

The Clerk: The last one is Defendants' Exhibit L.

Mr. Rudin: The next document to be admitted in evidence is a letter dated April 20, 1953, from Norman Tyre of Gang, Kopp & Tyre to Mr. George B. White.

The Court: It will be received.

The Clerk: Defendants' Exhibit M in evidence.

(Testimony of Mildred Becker Schultz.)

(Said document was received in evidence and marked as Defendants' Exhibit M.)

Q. (By Mr. Rudin): Now, would you look at Defendants' Exhibit M, Mrs. Schultz, and let me know if you read that on or about the time it was sent to Mr. White? A. Yes.

Q. Did you read the letter or did Mr. White send you a copy of it along about the time he received it, April 20, 1953?

A. I can't recall the date he sent it to me, but I remember reading it.

Q. Was it shortly around the time this correspondence was going on? [256]

A. My best recollection is that, at this time, as soon as he received a letter he sent on a copy to me.

Q. You were aware, then, some time around in the early part of 1953 that as far as Hill and Ranges Songs is concerned, it had taken the position that there was no access to your song, that there was no infringement and that the songs were not in any way alike, comparison had been made and your claim had been rejected, you were aware of it around that date, that Hill and Range had rejected your claim of infringement?

A. If that is the date that I received that letter, then I was aware of it.

Mr. Hoppe: As a matter of law, she was anyway, counsel.

Mr. Rudin: I accept that stipulation.

Q. Now, was your song, either "Good Old

(Testimony of Mildred Becker Schultz.)

Army" or "Waitin' for My Baby," ever performed in Los Angeles or in Hollywood?

A. Do you mean performed before an audience?

Q. Or any particular place; where was it performed?

A. I don't know. I don't remember of it having been performed publicly.

Q. Privately?

A. I do not know what happened to my song after I left it.

Q. You were never present in Los Angeles and in Hollywood [257] when your song was performed?

A. I did not hear in played, in person.

Q. Now, on or about April of 1953, did you have any information as to the financial reliability or standing of Tune Towne Tunes?

A. April?

Q. Yes. A. Of '53?

Q. That is right.

A. Mr. Rudin, I have to think back to realize what was going on about that time, to know.

Q. The date of the letter, that letter from Mr. Tyre to Mr. White was dated April 20, 1953, and I am talking about that period.

A. About that period, my best recollection was that I was aware of the fact that it was a very good song and had made quite a standing. As far as the financial end of it is concerned, to this day I don't know how much it made.

Q. Did you ever tell Mr. White or furnish him with any information of the song or request him to

(Testimony of Mildred Becker Schultz.)

make a claim that your songs had been performed in Los Angeles and in Hollywood?

A. I remember the letter you are referring to, Mr. Rudin, but I did not tell Mr. White that at all. I let Mr. White do his own research. [258]

Mr. Rudin: I have the original letter, but it has some of my handwritten notes on it.

The Court: All right.

Mr. Rudin: So I will use a copy Mr. Hoppe gave me.

The Court: Use a copy.

Mr. Rudin: Being a letter of April 21, 1953, to Gang, Kopp & Tyre from George B. White.

The Court: That will be satisfactory.

Mr. Rudin: It will be admitted in evidence as Defendants' Exhibit next in order?

The Court: Yes.

The Clerk: Defendants' Exhibit N in evidence.

(Said document was received in evidence and marked as Defendants' Exhibit N.)

Q. (By Mr. Rudin): You are then familiar with this letter, are you not, Mrs. Schultz?

A. From what you said, it's—yes. I am familiar with that letter.

Q. And you have no information within your knowledge to support the statement contained in this letter that your song was performed in Los Angeles and in Hollywood?

A. Not in Los Angeles and Hollywood. I don't know where Mr. White got his information, be-



(Testimony of Mildred Becker Schultz.)

cause I didn't tell him about Los Angeles and Hollywood, but I knew that it was performed in San Francisco. [259]

Q. Do you have any information as to the "reliable musicians" referred to in the third paragraph of his letter, who he is referring to?

A. I don't know who Mr. White contacted.

Q. Did you ever tell Mr. White or furnish him with any information that the members of the partnership of Tune Towne Tunes were involved in unsavory difficulties and left town?

A. I remember that letter also, sir. I believe Mr. White described it as a "smoking out" process, due to the fact he couldn't get an answer, and that is all I know about it. I didn't furnish any information. What Mr. White did on his own and what he learned on his own he didn't tell me.

Q. In other words, you have no information as to the truth of the statement contained in one of his letters in which he said, "A source which was represented to me as being reliable, calls to my attention the fact that the members of the partnership of Tune Town Tunes was involved in unsavory difficulties and allegedly left town"?

A. I have no information to that effect. I turned the case over to Mr. White. He did his own investigation. I don't know where he got his information.

Q. Are you aware that Mr. White once made the statement in one of his letters and said, "It was also represented [260] to me that your clients as

(Testimony of Mildred Becker Schultz.)

well as Capitol Records were negligent in general in not obtaining proper clearance on the songs in connection with which they entered into a contract with Tune Town Tunes”?

The Witness: Would you repeat that statement, Mr. Rudin?

Mr. Rudin: Well, let me have this letter marked in evidence and then I will question you about it. Will you concede that this letter is a true copy?

Mr. Hoppe: All right.

Mr. Rudin: Again, Mr. Hoppe, we stipulate that the copy of a letter to Gang, Kopp & Tyre, dated May 19, 1953, from George B. White, may be used in place of the original.

The Court: All right.

Mr. Rudin: As Defendants' Exhibit next in order and admitted in evidence.

The Court: All right.

The Clerk: Defendants' Exhibit O in evidence.

(Said document was received in evidence and marked as Defendants' Exhibit O.)

Q. (By Mr. Rudin): I will let you read that letter and I will call your attention to the third paragraph, which I have just read before, in which Mr. White stated:

“It was also represented to me that your clients as well as Capitol Records were negligent in general in not obtaining proper clearance on the songs in [261] connection with which they entered into a contract with Tune Town Tunes.”

(Testimony of Mildred Becker Schultz.)

A. Mr. White was a copyright attorney. I figured he knew his business. I turned the music and the copyrights over to Mr. White.

Q. And you are not the source of the information that he had along that line?

A. No, sir; I am not.

Q. Calling your attention to the fourth paragraph in which he states:

“My client also advises me that it is her recollection that she left a manuscript copy with Tune Town Tunes in Los Angeles, when she approached them many years ago for the publication of her song.”

Did you ever tell that to Mr. White?

A. Yes; I did tell him. It was my best recollection, but not knowing Hollywood and having doubts about the company and knowing where I left it, I was under the impression it could have been at the address on Santa Monica Boulevard.

Q. Did you tell Mr. White it could have been or did you tell him that it was there?

A. I told him that it could have been, that I could have left it over on Santa Monica Boulevard.

Q. You are now satisfied it was not Tune Towne Tunes? [262]

A. I have not been able to locate that building on Santa Monica Boulevard or anybody that was there. I do not know where the Tune Towne Tunes had their place of business up until I found out that it was at 6700 Sunset Boulevard. I don't know where their place of business was, and at that time

(Testimony of Mildred Becker Schultz.)

I was under the impression that it might have been on Santa Monica Boulevard.

Q. Do you know whether Mr. White ever received a reply to that letter?

A. Yes; I believe I do recall a reply.

Mr. Rudin: Mr. Hoppe has agreed that I can put in evidence as Defendants' Exhibit next in order our office carbon copy of a letter of May 22, 1953, from Mr. Tyre of our firm to Mr. George B. White.

The Court: All right.

The Clerk: Defendants' Exhibit P in evidence.

(Said document was received in evidence and marked as Defendants' Exhibit P.)

Q. (By Mr. Rudin): Did Mr. White send you a copy of this letter, Mrs. Schultz?

(The witness examines said exhibit.)

The Witness: May I see the next page?

Mr. Rudin: Yes.

(The witness further examines said document.)

A. I remember that letter. [263]

Q. And you are aware that Mr. Tyre informed Mr. White that he must be referring to other parties, because, as Mr. Tyre said, "from our experience which we have had with Tune Towne Tunes, these people have been completely reliable and to our knowledge have never been involved in any un-

(Testimony of Mildred Becker Schultz.)

savory difficulties. I am certain that you are confused as to the parties since Tune Towne Tunes has for the past several years been continuously in business in Los Angeles and is now so engaged." Did Mr. White discuss that statement by Mr. Tyre?

A. My best recollection at this moment is that at the time Mr. White couldn't get an answer from the Tune Towne Tunes and from all the information he could get was that they were supposed to be a corporation, but he wrote a letter to the Secretary of State, on which he was informed that they did not file Corporation papers, and I have no idea exactly where he got all his information.

Mr. Rudin: Now, counsel has agreed that we can put in evidence as next in order a letter of May 25, 1953, from Mr. White to Gang, Kopp & Tyre.

The Court: Yes. It may be received.

The Clerk: Defendants' Exhibit Q.

(Said document was received in evidence and marked as Defendants' Exhibit Q.) [264]

Q. (By Mr. Rudin): Did you see this letter, Mrs. Schultz, or a copy of it? A. Yes——

The Court: Your answer was "Yes"?

The Witness: What was the question again?

Q. (By Mr. Rudin): Did you see this letter or a copy of it, on or about the time it was sent, on May 25, 1953?

A. I presume that this particular letter was in my hands—I mean, he sent a copy of it to me.

(Testimony of Mildred Becker Schultz.)

Q. Yes. Calling your attention to this last paragraph of this letter, dated May 25, 1953, "At any rate I am submitting this whole correspondence to my client for decision as to the filing of infringement action in the matter."

The Witness: May I read it myself, please?

Mr. Rudin: Yes, certainly.

A. It confuses me (the witness examines said letter). If you are asking me did I see this letter, my answer is yes, sir.

Q. You did see that letter? A. Yes, I did.

Q. Did Mr. White do just what he said he was going to do in the third paragraph of the letter?

A. Mr. White did not file the suit.

Q. I see. You discussed the matter with [265] him in discussions with him.

Do you know if he had any further correspondence after that date?

A. I know that he had a further correspondence, but I have never seen the letter.

Mr. Rudin: Does counsel have anything other than this letter of June 1, 1953?

Mr. Hoppe: That is all that I received. I gave you my file, counsel.

Mr. Rudin: All right. Then your file is missing this letter (indicating document). I will put it in, if you agree to it, from our files. I make a representation that this letter was a carbon copy sent to us by Mr. Carl Hoefle on or about the time he wrote to Mr. White on May 26th, 1953.

(Testimony of Mildred Becker Schultz.)

Mr. Hoppe: And with that representation, it may go into evidence.

The Court: I will let it be received.

The Clerk: Defendants' Exhibit R in evidence.

(Said document was received in evidence and marked as Defendants' Exhibit R.)

Mr. Rudin: And may I now use counsel's own copy of a letter that Mr. White sent to Mr. Manuel Ruiz, dated June 1, 1953?

Mr. Hoppe: Yes; you may. [266]

Mr. Rudin: May that go in evidence as Defendants' Exhibit next in order?

The Court: It will be received.

The Clerk: Defendants' Exhibit S in evidence.

(Said document was received in evidence and marked as Defendants' Exhibit S.)

Mr. Rudin: To move along, Mr. Hoppe, is there any other correspondence with other counsel?

Mr. Hoppe: I don't have any.

Mr. Rudin: We don't have any, either.

Mr. Hoppe: No; I haven't seen any.

Q. (By Mr. Rudin): Did you see this copy of Mr. Ruiz's of June 1, 1953, a letter from Mr. White?

The Witness: Is that to Mr. Manuel Ruiz?

Mr. Rudin: Yes.

The Witness: May I look at it?

Mr. Rudin: Yes, certainly; please.

(The witness examines document.)

(Testimony of Mildred Becker Schultz.)

Mr. Rudin: Do you have the original file, Mr. Clerk?

The Court: Have you about all of the correspondence in now, Mr. Rudin?

Mr. Rudin: Yes. The next thing is on the Complaint and I am through.

The Court: Do you want the date the Complaint was filed?

Mr. Rudin: That is right. I have it here now. April [267] 29, 1954.

The Witness: What was your question about this letter, Mr. Rudin?

Q. (By Mr. Rudin): Did you know that Mr. White had sent that letter to Mr. Ruiz?

A. Yes, sir; I did.

Q. Were you aware of his sort of an apology for what he regarded as a libel of Tune Towne Tunes?

A. I was aware that he had received a letter from Mr. Ruiz and he sent this letter in the form of an apology, at least that is what I understood at the time, for what he might have said.

Q. And you are aware of the last paragraph of his letter:

"I want to assure you again that in corresponding in the matter I merely perform my duty to explore the possibilities of amicable settlement before I submit the matter to my client for a decision about filing a suit on account of the infringement of her copyright."



(Testimony of Mildred Becker Schultz.)

The Witness: What was the question you asked me?

Q. (By Mr. Rudin, continuing): You were aware of that paragraph of that letter?

A. Yes, sir; I was.

Q. And did Mr. White submit the matter to you on or about that time?

A. You mean as to whether to file suit? [268]

Q. For decision as to whether to file suit?

A. He considered filing suit.

Q. But he advised you of that paragraph of that letter? A. Yes, sir; he did.

Q. Did he advise you of any subsequent correspondence in this matter?

A. What do you mean by that, like any other correspondence?

Q. Well, after the letter from Mr. Ruiz, did he hear anything further from anybody and tell you about it?

A. My best recollection is about that time of the letter, a new attorney wanted to take the case up, because time was going on and there was nothing being done.

Q. Can't you limit yourself to answering the question? Did he advise you about any further correspondence after June, 1953?

A. My best recollection is that I don't remember any other.

Q. Well, then, did you ever see this Complaint which is in the file? Well, I assume that is authorized, your Honor. I only want to note at this point

(Testimony of Mildred Becker Schultz.)

for the record that this Complaint was filed April 29, 1954.

The Court: Yes.

Mr. Hoppe: Is that the one that was filed in San Francisco?

Mr. Rudin: Yes, and it was subsequently transferred here [269] and the September date is the date of the transfer.

The Court: Yes. "August 21" is the date on here.

Mr. Rudin: It was not the date it was first assigned to your Honor.

Mr. Hoppe: That is right.

Mr. Rudin: I have no further questions of this witness, your Honor.

The Court: Do you want to examine her on this question?

Mr. Hoppe: Yes.

### Cross-Examination

By Mr. Hoppe:

Q. Mrs. Schultz, between June of 1953 and April of 1954, you employed other counsel, did you not?

A. I had a Mr. McCarthy, but I have to think of the dates.

The Court: Well, it is true that you did make a switch in there?

A. Yes.

The Court: That is all right. He just asked you.

The Witness: Yes.

Mr. Hoppe: That is all.

The Court: Is that all?

Mr. Ruiz: No questions.

The Court: Do you have another witness? Well, shall we stop and take a little recess?

Mr. Rudin: Well, your Honor, I don't know whether Mr. Hoppe [270] may discuss this from the floor. Mr. Hoppe, I would be the next witness, not as to a very important material fact, but the only submission was to Schumann Music Corp., addressed to 1411 N. Serrano Ave. I am referring to Defendants' Exhibit A, postmarked "Aug. 4, 1941," and it is marked "Refused" in pencil, and it is marked "1911 N. Serrano," and I would be in the strange circumstance of testifying as to this word "Refused."

Mr. Hoppe: That is all right. I have no objection to counsel testifying.

The Court: He will take your word for it.

Mr. Rudin: May I make a short statement, please?

Mr. Hoppe: If I may ask you a question on it.

Mr. Rudin: Yes. I might as well explain that at that time I was living with my cousin, Walter Schumann, who published the song called the Hut Sut Song. He was about to go in the Army and I was about to go to law school. He never published a song before. It took off as a tremendous hit and we were busy working out an analysis on sheet music and trying to get it published and trying to run a music company without knowing how, and along came about two hundred or three hundred

letters similar to this pertaining to songs; and without legal training, I wrote on all of them "Refused" and gave them back to the Post Office and this I recognize as my [271] handwriting.

The Court: All right.

Mr. Rudin: And the envelope was not opened, and "Refused" and mailed back.

The Court: All right.

Mr. Hoppe: We have no objection to that testimony.

The Court: All right. May the witness step down?

Mr. Rudin: Yes.

The Court: Well, we might stop and take about a ten-minutes recess.

(Recess.)

The Court: Are we ready now?

Mr. Rudin: Yes. Upon talking to Mr. Hoppe during the recess, the only additional evidence as far as the defendants we represent are concerned I would like to put in would be either by deposition or it may be Mr. Hoppe would stipulate without the evidence relating to when "Blacksmith Blues" was on the Hit Parade, when it was on the Hit Parade in San Francisco. I think we can get a statement on that and file a stipulation.

The Court: Yes, and you can just incorporate that in the record, is that it?

Mr. Rudin: And incorporate it in the record, and if we can't do it by stipulation we will file the originals of the depositions. [272]

Mr. Hoppe: That is all right with me, your Honor. I think we will be able to get together on it.

The Court: Yes. That is all right. Just file it.

Mr. Rudin: We will get the information from NBC on it.

The Court: And then file it in stipulation form. Send it up and have him sign it, and file it.

Mr. Rudin: We rest subject to that.

The Court: All right. Now, how about you, Mr. Hoppe, do you rest, too?

Mr. Hoppe: I would like to rest.

The Court: Wait a minute.

(A short intermission.)

The Court: All right, Mr. Hoppe?

Mr. Hoppe: Your Honor, before proceeding I would like to make a motion to strike, to make the record clear on my position in the case.

The Court: All right.

Mr. Hoppe: It won't take long.

The Court: All right.

Mr. Hoppe: I would like to strike Defendants' Exhibit C, on the ground that the comparative chart compares only the question in the first bar of each of the comparative songs and does not purport to compare the other questions relating in the songs, but bases the comparison on where things appear in the song rather than in relationship to their subject [273] matter.

I make a motion to strike Defendants' Exhibit D, on the ground that it is not the best evidence of the matters that appear on Defendants' Exhibit D

and on the further ground that the expert conceded on the witness stand that it was not an accurate reproduction of the things which appeared in the source materials.

I make a motion to strike Exhibit E, on the ground that it is not the best evidence of the matters which are reported thereon.

I make a motion to strike the comparison chart—I can't see the number of it—it is at the back of Exhibit E—on the ground that it does not purport to align the questions one with the other except with respect to the first question.

I make a motion to strike all the testimony that is based upon the exhibits which I have moved to strike, on the ground that there is no foundation for such testimony.

The Court: I will deny the motions to strike.

Mr. Hoppe: Now, your Honor, I have no further testimony, but I would like leave to introduce in evidence two certified copies of papers which I have just located today, based upon—first, of all, I will offer in evidence the Certificate of Copyright, Number 191310, issued to Charles Douglass Hone, covering “Happy Pay Off Day,” [274] dated January 25, 1950, which I have just obtained from counsel, and Certificate of Copyright Registration Number 45529, dated April 17, 1950, also covering “Happy Pay Off Day,” as Plaintiff's exhibits next in order.

The Court: All right.

Mr. Ruiz: No objection.

Mr. Rudin: No objection.

The Clerk: Those will be Plaintiff's Exhibits 17 and 18 in evidence.

The Court: All right.

(Said documents were received in evidence and marked as Plaintiff's Exhibits 17 and 18, respectively.)

Mr. Hoppe: Now, your Honor, on one of those exhibits, which I saw for the first time before the lunch hour, there is reference to a Golden West Music Press to whom the Copyright Certificate was to be returned.

The Court: Can you wait just a second?

Mr. Hoppe: Yes, sir.

(A short intermission.)

The Court: All right.

Mr. Hoppe: Now, your Honor, with reference to the matter that I started to go into, counsel for the opponents and I are going to try to get together and stipulate [275] as to the facts with reference to the matter.

The Court: Yes.

Mr. Hoppe: And I would like to have our proofs held over until we can reach an understanding as to that. Other than that, we are through.

Mr. Rudin: We are through.

Mr. Ruiz: A stipulation with respect to what items?

Mr. Hoppe: That is with respect to who owns Westmore Music Corporation, who owns Golden West Music publishers, where they are located, and

who owns Golden West Music Press, and the relationship, if any.

Mr. Ruiz: What is the materiality here, counsel? I am lost here. I know you gentlemen have been talking.

Mr. Rudin: He wants to put it in.

Mr. Ruiz: He says he wants to put it in.

The Court: How do you propose to put it in, Mr. Hoppe?

Mr. Hoppe: These are facts I found out just today, your Honor.

The Court: All right.

Mr. Ruiz: What is the materiality, counsel?

The Court: Let us wait until he finishes here.

Mr. Hoppe: Here is the materiality: We have in evidence a contract that Westmore Music Corporation presented to our client for signature in 1942, in which it appears that they had the music before them at that [276] time. Now, we find that Golden West Music Press was the printer of the music, one of the sheets of music which is charged to be an infringement. Using that as a basis—I found that out just before this luncheon recess, your Honor, about this Golden West Music Press—I then went over to the records in the County Recorder's office, the Corporation Division, and found out that Golden West Music Publishers was located down here in Los Angeles and was run by a Sylvester L. Cross. I also found out that Westmore Music Corporation was a corporation which was run by Sylvester L. Cross. I think that that evidence will definitely place the music down here in Los An-



geles, and if Golden West Music Publishers and Golden West Music Press are the same people it will definitely place the music in the hands of the defendants. Now, I am not making the representation that that exists, and counsel and I are going to try to reach an understanding as to it, but, if it does exist I think it would be very material on the question of access, because at the opening statement I said that we had no direct evidence of access; we had only the circumstantial evidence which has gone in the record here. If this chain linkage that I believe exists is true, it would prove direct access. If part of the chain is true, it would put the music down here in the Los Angeles area in 1942. So it would either be [277] wholly material on the question of direct evidence as to access, or, in the alternative, it would be added circumstantial evidence **showing** access by the music being in the Hollywood area in 1942.

Mr. Rudin: Your Honor, I don't know where he got the name or where it appears, of Golden West Music Press. Fortunately this is a chain I wouldn't want to hang by, because I know a little bit, our firm being involved in the music business, **about these various people** he is talking about.

Sylvester Cross runs what we refer to as Hill Billy under a few names. He might have one of them called Golden West Music Publishers. Basically it is Golden West Music publishing. There is no connection with any of the defendants in this action. In fact, it is a competitor of Hill and Range Songs. Whether he uses the name Westmore

Music or Golden West Music Publishers, I don't know.

There is a little old print shop on Highland Avenue that prints sheet music, called Golden West Music Press, that is what it is called, and we have got it listed here as the Golden West Musical Publishing Company in 1929 of Julius Levinson. I think you will find that is the same Julius Levinson still printing music over on Highland Avenue. It has nothing to do with the [278] alleged access. It has nothing to do with these defendants. I don't know what the chain is.

If you want to prove the corporate organization of any of these chains, get a corporate certificate from the Secretary of State and we will stipulate that those are the facts, but we will not stipulate to the materiality, your Honor, because I don't know what Golden West Music Press itself has to do with it.

Mr. Ruiz: I think we are unduly prolonging this matter. I don't see the materiality whatsoever, unless it is connected with one of the defendants in this action.

If in this Los Angeles area they took at some time or another one of these pieces to a Mr. Smith or a Mr. Jones, it is still immaterial; it doesn't show access whatsoever.

The Court: Well, I think you have enough in the record just by your statement, Mr. Hoppe. I think that is sufficient.

Mr. Hoppe: All right, your Honor.

The Court: I mean that is my thought on it. You have stated it before the court.

Mr. Rudin: Golden West Music Press, your Honor, is not the same as Golden West Music Publishing Company. I don't know who is going to tie up by this.

Mr. Hoppe: Without bothering your Honor with it, I [279] think before the matter is completely briefed, if we are going to brief it, we can reach an understanding as to what it is. I suggest——

Mr. Ruiz: If it were material, yes.

Mr. Rudin: I think I can solve the problem, your Honor.

The Court: Well, I have his statement. Do you have a suggestion, Mr. Hoppe?

Mr. Rudin: Seriously, let Mr. Hoppe check on Highland Avenue and find out if the Golden West Music Press isn't Julius and his two associates who are running the print shop and have nothing to do with Sylvester Cross and that may satisfy him. If he wants to put in any evidence as to corporate organizations——

The Court: He can put it in his opening brief.

Mr. Rudin: Put it in his opening brief. We will stipulate to it, but we won't admit to the materiality of it.

The Court: Put it in your opening brief and we will file it, and the clerk will give it a number. How is that? If you feel that you want it.

Mr. Hoppe: I may be on a wild goose chase, your Honor.

The Court: Well, we will have that understand-

ing. You put it in your opening brief and we will make it an exhibit if you feel that it is that way. Of course, I have their objection to the materiality, and I will rule on the [280] matter and then I will send Mr. Rudin, Mr. Wolff and Mr. Ruiz a card as to what my ruling is on the exhibit.

Mr. Hoppe: I think that is all right.

The Court: I think that is the fair way. With that, the case will be submitted. Now, just one question: What do you want, about 20 days?

Mr. Hoppe: I would like 20 days, your Honor.

The Court: What do you want, twenty to reply?

Mr. Ruiz: Do you think briefs are necessary?

The Court: Well, counsel is going back to San Francisco and he wants to submit the matter.

Mr. Rudin: I would like to file a brief and Mr. Ruiz may want to join in our brief.

The Court: Yes. Mr. Hoppe is going back to San Francisco.

Then, you will have 20 days and they will have 20 days, that is forty; and then say ten days to reply?

Mr. Hoppe: Ten to reply.

The Court: Yes. If I fix the time, it is better. In other words, 20, 20 and 10. Then if you have any difficulty you don't need to send a stipulation; just write the attorney and send us a copy, if you want a little additional time. Then at the conclusion of the matter the court will mark the matter submitted. Is that satisfactory? [281]

Mr. Hoppe: Fine, your Honor.

The Court: All right. Then it will be up to Mr.

Ruiz to join in the brief or file his own brief. He can confer with Mr. Wolff and Mr. Rudin on that matter, but I think that you will have to send Mr. Ruiz a copy of your brief, too.

Mr. Hoppe: I certainly will, your Honor.

The Court: Yes. Very well.

Mr. Hoppe: And you like to have two copies here?

The Court: Yes. Well, as a rule we require two.

The Clerk: Two.

The Court: One for the office file of the clerk and one for the court's file.

The Clerk: In duplicate.

The Court: In duplicate. So that you will make four copies.

We are going to allow them to take that Exhibit F and have it photostated and filed, just the cover and the first page, wasn't that the understanding?

The Clerk: The cover and the first page.

The Court: Yes. So that exhibit is withdrawn. Thank you.

Mr. Hoppe: Thank you for a nice hearing, your Honor.

The Court: All right.

[Endorsed]: Filed March 21, 1958. [282]

[Title of District Court and Cause.]

### CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages, numbered 1 to 127, inclusive, containing the original:

Complaint.

Order re Change of Venue (copy).

Amended Complaint.

Answer of Carl Hoefle and Delmar Porter to First Amended Complaint.

Answer of Capitol Records, Inc., and Capitol Records Distributing Corp., to First Amended Complaint.

Answer of Hill and Range Songs, Inc., and Rumbalero Music, Inc., to First Amended Complaint.

Answer of Broadcast Music, Inc., to First Amended Complaint.

Answer of Decca Records, Inc., to First Amended Complaint.

Answer of Lowe's, Incorporated, to First Amended Complaint.

Answer of Radio Corporation of America to First Amended Complaint.

Answer of Columbia Records, Inc., to First Amended Complaint.

Order for Findings of Fact, Conclusions of Law and Judgment.

Findings of Fact, Conclusions of Law and Judgment.

Notice of Motion to Fix Attorney's Fees.

Affidavit of Milton A. Rudin in support of motion to fix Attorney's Fees.

Affidavit of Plaintiff in Opposition to Motion to Fix Attorney's Fees.

Minute Order, 1/27/58, re Denial of Motion to Fix Attorney's Fees.

Plaintiff's Notice of Appeal.

Plaintiff-Appellant's Designation of Contents of Record on Appeal.

Plaintiff-Appellant's Statement of Points on Appeal.

Proof of Service.

Amended Proof of Service.

Defendants-Appellants Notice of Appeal.

Designation by Defendants-Appellants of Contents of Record on Appeal.

Defendants-Appellant's Statement of Points on Appeal.

Notice of Motion and Motion to Extend Time for Filing Record and Docketing Appeal and Order Thereon.

B. Plaintiff's Exhibits Nos. 1 to 18, inclusive.

Defendant's Exhibits A to S, inclusive.

C. Reporter's Official Transcript of Proceedings had on: 9-17-57; 9-18-57; and 9-19-57.

I further certify my fee for preparing the foregoing record, amounting to \$2.00, has been paid by appellant.

Dated: April 8, 1958.

[Seal]                      JOHN A. CHILDRESS,  
Clerk;

By /s/ WM. A. WHITE,  
Deputy Clerk.

---

[Endorsed]: No. 15973. United States Court of Appeals for the Ninth Circuit. Mildred Becker Schultz, Appellant, vs. Jack Holmes, et al., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed April 9, 1958.

Docketed April 11, 1958.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.



In the United States Court of Appeals  
for the Ninth Circuit

No. 15973

MILDRED BECKER SCHULTZ,

Appellant,

vs.

JACK HOLMES, et al.,

Appellees.

APPELLANT'S STATEMENT OF POINTS  
AND DESIGNATION OF PORTION OF  
RECORD TO BE PRINTED

Appellant Mildred Becker Schultz, in accordance with Rule 17.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, states that the points upon which she intends to rely upon her appeal from the Final Judgment entered by the District Court on January 8, 1958, are as follows:

1. The District Court erred in ordering, adjudging and decreeing that plaintiff, Mildred Becker Schultz, take nothing by her amended complaint herein.

2. The District Court erred in ordering, adjudging and decreeing that defendants have judgment for their costs of suit.

3. The District Court erred in finding that Jack Holmes composed the music of the compositions

entitled "Happy Pay Off Day" and "The Blacksmith Blues" (Finding of Fact No. 5).

4. The District Court erred in finding that the musical compositions "Happy Pay Off Day" and "The Blacksmith Blues" were original with Jack Holmes (Finding of Fact No. 5).

5. The District Court erred in finding defendants herein, other than Jack Holmes, originally named as a defendant, are licensees and/or assignees of certain rights to publish, publicly perform for profit, record and distribute phonograph recordings of, and otherwise exploit, said "Happy Pay Off Day" and "The Blacksmith Blues" (Finding of Fact No. 6).

6. The District Court erred in finding that plaintiff did not submit a copy of her compositions, or either of them, to Jack Holmes or to defendants, or any of them, prior to Jack Holmes' composition of "Happy Pay Off Day" and "The Blacksmith Blues," as aforesaid (Finding of Fact No. 10).

7. The District Court erred in finding that it is not true that Jack Holmes, or defendants, or any of them, had ever seen a copy, or heard a performance of plaintiff's compositions, or either of them, or in any other way were aware of the existence of plaintiff's compositions prior to Jack Holmes' composition of "Happy Pay Off Day" and "The Blacksmith Blues," as aforesaid (Finding of Fact No. 11).

8. The District Court erred in failing to find that plaintiff did disseminate her musical composition widely for purposes of consideration among musicians, arrangers, publishers and others in the musical industry.

9. The District Court erred in failing to find that defendants, and each of them, received copies of her musical composition.

10. The District Court erred in finding that insofar as musical material in "Happy Pay Off Day" and "The Blacksmith Blues" bears any similarity to "Good Old Army" or "Waitin' For My Baby," such musical material was not copied or prepared from plaintiff's compositions (Finding of Fact No. 12).

11. The District Court erred in finding that the common utilization by different compositions of a few notes such as herein found to exist occurs frequently in the field of popular music, particularly because of the limited number of pleasing tonal combinations within the average person's range of voice and skill (Finding of Fact No. 12).

12. The District Court erred in finding that, because of differences set forth in Finding 13, the first measure of the respective compositions of plaintiff and Holmes, when performed, convey to the average listener, as well as to a person skilled in music, a substantially different musical sound, feeling and impression (Finding of Fact No. 14).

13. The District Court erred in finding that the construction, modulations, phrasing, musical notes, and other musical material contained in "Happy Pay Off Day" and "The Blacksmith Blues" are not similar to that of "Good Old Army" and "Waitin' for My Baby" (Finding of Fact No. 15).

14. The District Court erred in finding that a performance of either "Good Old Army" or "Waitin' for My Baby" does not convey or give an impression to the average listener, of similarity or resemblance to "Happy Pay Off Day" or "The Blacksmith Blues," in any particular or taken as a whole (Finding of Fact No. 16).

15. The District Court erred in finding that neither all of "Happy Pay Off Day" or "The Blacksmith Blues," nor any part thereof, was copied or prepared from "Good Old Army" or "Waitin' for My Baby," or any part thereof (Finding of Fact No. 17).

16. The District Court erred in finding that it is not true that Jack Holmes or defendants, or any of them, have used the results of plaintiff's labors and incorporated the results thereof in "Happy Pay Off Day" or "The Blacksmith Blues," by the publishing, selling, and otherwise marketing of said compositions (Finding of Fact of No. 18).

17. The District Court erred in failing to find that Jack Holmes, alias Charles Douglas Hone, copied from plaintiff's copyrighted compositions "Good Old Army" or "Waitin' for My Baby" or

from both of them when he wrote the music of the musical compositions entitled "Happy Pay Off Day" and "The Blacksmith Blues."

18. The District Court erred in failing to find that defendants, and each of them, used the results of plaintiff's labors and incorporated such results in the infringing musical compositions "Happy Pay Off Day" and "The Blacksmith Blues."

19. The District Court erred in concluding that neither of the compositions, "Happy Pay Off Day" nor "The Blacksmith Blues," are infringements upon plaintiff's compositions "Good Old Army" or "Waitin' for My Baby" (Conclusion of Law No. II).

20. The District Court erred in failing to conclude that the composition "Happy Pay Off Day" and "The Blacksmith Blues" are both infringements upon plaintiff's compositions "Good Old Army" and "Waitin' for My Baby."

21. The District Court erred in concluding defendants herein are not guilty of having engaged in unfair trade practices or unfair competition by their having published, sold, and otherwise marketed the compositions, "Happy Pay Off Day" and "The Blacksmith Blues" (Conclusion of Law No. III).

22. The District Court erred in concluding that defendants are entitled to judgment herein for their costs of suit incurred herein (Conclusion of Law No. IV).

23. The District Court erred in failing to find that plaintiff is entitled to judgment as prayed in the Amended Complaint filed March 18, 1955.

\* \* \*

Appellant further designates that plaintiff's Exhibits 2, 3, 5, 6, 8, 12, 14, 15, 16 and defendant's Exhibits D, E and F are documentary exhibits which are material to the appeal. Appellant will incorporate them into books of exhibits to be prepared by appellant and to be delivered by appellant to appellee in accordance with prevailing practice in the Ninth Circuit.

/s/ CECIL HOPPE,  
One of the Attorneys for  
Appellant.

Proof of service attached.

[Endorsed]: Filed May 9, 1958.

No. 15,973

In the

United States Court of Appeals

*For the Ninth Circuit*

MILDRED BECKER SCHULTZ,

*Appellant,*

vs.

CARL HOEFLE and DELMAR S. PORTER, individually and as copartners d.b.a. TUNE TOWNE TUNES; CAPITAL RECORDS, INC.; CAPITAL RECORDS DISTRIBUTING CORP.; HILL AND RANGE SONGS, INC.; RUMBA- LERO MUSIC, INC.; BROADCAST MUSIC, INC.; DECCA RECORDS, INC.; LOEW'S INCORPORATED; RADIO CORPORATION OF AMERICA; and COLUMBIA RECORDS, INC.,

*Appellees.*

Appellant's Opening Brief

CARL HOPPE

JAMES F. MITCHELL

2610 Russ Building  
San Francisco 4, California

THOMAS P. MAHONEY

4055 Wilshire Boulevard  
Los Angeles 5, California

*Attorneys for Appellant*

FILED

NO. 12 1958

PAUL P. O'BRIEN, CLERK





# INDEX

|  | Page |
|--|------|
| Appellant's Opening Brief.....   | 1    |
| Jurisdiction .....   | 2    |
| Statement of the case.....   | 2    |
| Questions presented .....  | 2    |
| The proceedings below.....   | 3    |
| Specification of errors.....   | 9    |
| Summary of argument.....   | 12   |
| Argument .....   | 14   |
| Rule 52 does not preclude review of the findings of fact in<br>this case .....         | 14   |
| Preliminary chronology of facts.....   | 17   |
| Copyright infringement requires copying.....   | 19   |
| The record discloses opportunity for copying.....                                      | 20   |
| Defendants' music contains its own internal evidence of<br>copying .....               | 22   |
| The putative infringing bars and the Schultz figure have<br>common peculiarities ..... | 23   |
| The common peculiarities are not found in the prior art<br>in the public domain.....   | 25   |
| The law accepts proof of common peculiarities as proof of<br>copying .....             | 27   |
| The foregoing law is particularly pertinent in this case....                           | 33   |
| Finding 5 is clearly erroneous.....  | 35   |
| Finding 6 is clearly erroneous.....  | 36   |
| Findings 10, 11, 12 (first part), 17 and 18 are clearly<br>erroneous .....             | 37   |

|  | Page |
|--|------|
| Finding 12 (last part) is clearly erroneous.....   | 41   |
| Findings 14, 15 and 16 are clearly erroneous.....  | 41   |
| The District Court should have entered judgment of in-<br>fringement and awarded an accounting of damages and<br>profits ..... | 46   |
| Conclusion .....   | 47   |
| Appendix, under Rule 18  |      |

# TABLE OF AUTHORITIES

| CASES CITED  | Pages      |
|--|------------|
| Arnstein v. Porter (2nd Cir. 1946) 154 F.2d 464.....                                   | 16, 32, 40 |
| Baron v. Leo Feist, Inc. (S.D.N.Y. 1948) 78 F. Supp. 686....                           | 32         |
| Benny v. Loew's Incorporated (9th Cir. 1956) 239 F.2d 532..                            | 44         |
| Blume v. Spear (S.D.N.Y. 1887) 30 Fed. 629.....  | 29, 45     |
| Castle v. Bullard (1860) 23 How. (64 U.S.) 172.....                                    | 27         |
| Chicago Record-Herald Co. v. Tribune Ass'n. (7th Cir. 1921)<br>275 Fed. 797.....       | 46         |
| Cholvin v. B. & F. Music Co. (7th Cir. 1958) 253 F.2d 102....                          | 33         |
| College Entrance Book Co., Inc. v. Amseo Book Co. (2nd Cir.<br>1941) 119 F.2d 874..... | 32         |
| Edwards and Deutsch Lithographing Co. v. Boorman (7th<br>Cir. 1926) 15 F.2d 35.....    | 31         |
| Frank Shepard Co. v. Zachary P. Taylor Pub. Co. (2nd Cir.<br>1912) 193 Fed. 991.....   | 30, 40     |
| Fred Fisher, Inc. v. Dillingham (S.D.N.Y. 1924) 298 Fed.<br>145 .....                  | 44         |
| General Drafting Co. v. Andrews (2nd Cir. 1930) 37 F.2d<br>54 .....                    | 31         |
| Hartfield v. Peterson (2nd Cir. 1937) 91 F.2d 998.....                                 | 32         |
| King Features Syndicate v. Fleischer (2nd Cir. 1924) 299<br>Fed. 533 .....             | 45         |
| Kuhn v. Princess Lida of Thurn & Taxis (3rd Cir. 1941) 119<br>F.2d 704 .....           | 15         |
| List Pub. Co. v. Keller (S.D.N.Y. 1887) 30 Fed. 772.....                               | 30         |
| Mawman v. Tegg (1826) 2 Russ. 385, 38 Eng. Rep. 380.....                               | 29         |
| Mazer v. Stein (1954) 347 U.S. 201, 74 S.Ct. 460.....                                  | 20         |
| O'Neill v. General Film Co. (1915) 152 N.Y.S. 599.....                                 | 30         |
| O'Neill v. General Film Co. (1916) 157 N.Y.S. 1028.....                                | 30         |
| Robert Edwards, The (1821) 6 Wheat. (19 U.S.) 187.....                                 | 28         |
| Rogers v. Missouri Pacific Railroad Company (1957) 352 U.S.<br>500, 77 S.Ct. 443.....  | 28         |

|  | Pages  |
|--|--------|
| Soy Food Mills v. Pillsbury Mills (7th Cir. 1947) 161 F.2d 22 .....                  | 16     |
| United States v. Gypsum Co. (1948) 333 U.S. 364, 68 S.Ct. 525 .....                  | 14     |
| Universal Pictures Co. v. Harold Lloyd Corporation (9th Cir. 1947) 162 F.2d 354..... | 45     |
| Werner v. Encyclopaedia Britannica Co. (3rd Cir. 1905) 134 Fed. 831 .....            | 30     |
| W. H. Anderson Co. v. Baldwin Law Pub. Co. (6th Cir. 1938) 27 F.2d 82.....           | 31     |
| Wihtol v. Wells (7th Cir. 1956) 231 F.2d 550.....                                    | 32     |
| Wilkie v. Santly Bros. (2nd Cir. 1937) 91 F.2d 978.....                              | 31, 40 |
| Wire Tie Mach. Co. v. Pacific Box Corporation (9th Cir. 1939) 102 F.2d 543.....      | 15     |

#### STATUTES AND RULES

|   |    |
|---|----|
| Federal Rules of Civil Procedure, Rule 52(a)..... | 14 |
| U. S. Code, Title 17:                             |    |
| Sec. 3 .....                                      | 44 |
| Sec. 101 .....                                    | 47 |
| U. S. Code, Title 28:                             |    |
| Sec. 1291 .....                                   | 2  |
| Sec. 1338 .....                                   | 2  |
| Sec. 2106 .....                                   | 16 |
| Sec. 2107 .....                                   | 2  |

#### OTHER AUTHORITIES

|                                      |    |
|--------------------------------------|----|
| Shafter, Musical Copyright.....      | 44 |
| Wigmore, II Wigmore on Evidence..... | 29 |

In the  
**United States Court of Appeals**  
*For the Ninth Circuit*

---

---

MILDRED BECKER SCHULTZ,

*Appellant,*

vs.

CARL HOEFLE and DELMAR S. PORTER, individually and as copartners d.b.a. TUNE TOWNE TUNES; CAPITAL RECORDS, INC.; CAPITAL RECORDS DISTRIBUTING CORP.; HILL AND RANGE SONGS, INC.; RUMBA- LERO MUSIC, INC.; BROADCAST MUSIC, INC.; DECCA RECORDS, INC.; LOEW'S INCORPORATED; RADIO CORPORATION OF AMERICA; and COLUMBIA RECORDS, INC.,

*Appellees.*

---

**Appellant's Opening Brief**

---

This is a civil action for copyright infringement. The United States District Court for the Southern District of California, Central Division, the Honorable Thurmond Clarke, District Judge, presiding, dismissed the complaint after a trial on the merits. Plaintiff appeals from the judgment of dismissal.

## **JURISDICTION**

Issue was joined in the District Court upon an Amended Complaint (R. 3-8) and the several answers of the several defendants (R. 8-53).

The Amended Complaint charges the defendants with infringing the plaintiff's registered copyrights for musical compositions (R. 4-6). The District Court had jurisdiction of the cause under U. S. Code, Title 28, Section 1338 (R. 4, 60).

The judgment or final decision of the District Court was entered January 8, 1958 (R. 61-63). Plaintiff filed her notice of appeal on February 6, 1958 (R. 64) within 30 days after entry of the final decision. This Court has jurisdiction of the appeal under U. S. Code, Title 28, Sections 1291 and 2107.

## **STATEMENT OF THE CASE**

### **Questions Presented.**

The critical questions presented by this appeal are:

1. Where there is no direct evidence of access in a copyright infringement action, is not infringement of a musical copyright proved by a combination of the following circumstances:

(a) Undisputed evidence that there was an ample opportunity for access in many places of public entertainment in a single state;

(b) Undisputed evidence that the putative infringements utilize a substantial number of bars based upon a generally well known musical triad but having a peculiar identity of position of notes within the bar and timing of notes found earlier in the copyrighted music; and

(c) Undisputed evidence that the prior art music found in the public domain fails to disclose the identical peculiar

position of notes within the bar and timing of notes found in common only in the putative infringements and in the earlier copyrighted music?

2. Where there is evidence that the alleged infringing music as an entirety does not follow the complete form of the copyrighted music, is not infringement proved by undisputed evidence showing the repetitive use in the alleged infringing music of a bar substantially identical to the principal bar of the copyrighted music and of variations and modulations of that bar?

Plaintiff on this appeal develops the record basis for said questions and contends that both questions should be answered in the affirmative.

### **The Proceedings Below.**

The District Court found that plaintiff is the owner of valid subsisting copyrights on her musical compositions "Good Old Army" (Pl. Exh. 2, Exh. Bk. 1-2) and "Waitin' For My Baby" (Pl. Exh. 5, Exh. Bk. 7-8). The pertinent findings of fact are:

"2. Prior to April 7, 1941, plaintiff composed the words and music of a musical composition entitled 'Good Old Army' and subsequently applied for and received from the United States Register of Copyrights a certificate of copyright (unpublished) on said composition, bearing No. E 254497, dated April 7, 1951 [1941]." (R. 56)

"3. Prior to July 7, 1949, plaintiff adapted the music of said 'Good Old Army,' composed different words, and entitled the words and music of said musical composition 'Waitin' For My Baby,' and subsequently applied for and received from the United States Register of Copyrights a certificate of copyright (unpublished) on said composition bearing No. E 172341, dated July 7, 1949." (R. 56)

“4. Plaintiff is sole and exclusive owner of said compositions, ‘Good Old Army’ and ‘Waitin’ For My Baby,’ insofar as said compositions may be subject to exclusive ownership, as hereinafter provided.” (R. 56)

In considering the plaintiff’s musical composition, the particular attention of the Court is called to what hereinafter will be referred to as the Schultz figure. This figure forms the basis for the plaintiff’s contention, developed later in this brief, that the defendants have infringed her copyrights.

In “Good Old Army,” the Schultz figure appears in a natural key, C major, in the first bar of a 32-bar chorus as follows:



In “Good Old Army,” the Schultz figure shown above is used without variation in bars 1 and 2 of the chorus and is used with variations in bars 9, 10, 25 and 26 (Pl. Exh. 2, Exh. Bk. 1). The experts for the defendants have referred to this figure as being a do-mi-sol triad with a passing note (R. 171, 207-208).

In “Waitin’ For My Baby” the Schultz figure appears in three flats, in the key of E flat major, and is used in the first bar of a 32-bar chorus as follows:



The exhibit, speaking for itself, discloses that the foregoing Schultz figure is identical with the Schultz figure of “Good Old Army” with the exceptions (1) that the entire



figure is transposed two notes upwardly to accommodate the change in key from the natural key, C major, to the key of E flat major, and (2) that the last note of the Schultz figure in "Good Old Army" has a dotted 1/4th value (3/8) whereas that in "Waitin' For My Baby" has a value of 1/4th and is followed by a 1/8th rest, making a total time value of 3/8 for the two factors. The Schultz figure appears in bars 1 and 25 of the chorus in "Waitin' For My Baby" without change and variations of it appear in bars 2, 9, 10 and 26 (Pl. Exh. 5, Exh. Bk. 7).

After the plaintiff obtained her copyrights on her music incorporating the Schultz figure, the several defendants published a popular song entitled "The Blacksmith Blues" (Pl. Exh. 8, Exh. Bk. 13-16). The defendants all admit that they have caused "The Blacksmith Blues" to be published and sold (R. 10, 14, 22-23, 28, 32, 39, 45 and 49). An earlier version of the music of "The Blacksmith Blues" was produced and copyrighted under the title "Happy Pay Off Day" (see Pl. Exh. 8, Exh. Bk. 14). In this brief, plaintiff refers to the music of "The Blacksmith Blues" as comprehending the same music, regardless of the actual title under which it was published.

It is the contention of the plaintiff that this music uses the Schultz figure in violation of the plaintiff's copyrights. In "The Blacksmith Blues," the putative infringement appears in three flats, in the key of E flat major, and is used in the first bar of a 16-bar chorus as follows:



The exhibit, speaking for itself, discloses that the putative infringing figure is used with variations in bars 3, 5,

7, 9, 11, 13 and 15 of "The Blacksmith Blues" (Pl. Exh. 8, Exh. Bk. 14 and 15). One of the time variations consisting of 3/16: 1/16: 3/16: 1/16: 1/8: 3/8 used in bar 5 of "The Blacksmith Blues" was used earlier in bars 1 and 2 of "Good Old Army" and in bar 9 of "Waitin' For My Baby." The variation of connecting the passing note and the sol component by a slur as used in bar 13 of "The Blacksmith Blues" was used earlier in bar 9 of "Waitin' For my Baby."

The exhibits, speaking for themselves, disclose the following similarities between the copyrighted bar and the putative infringing bar (R. 186-187).

| GOOD OLD ARMY |       | WAITIN' FOR MY BABY |       | THE BLACKSMITH BLUES |       |
|---------------|-------|---------------------|-------|----------------------|-------|
| Pitch         | Value | Pitch               | Value | Pitch                | Value |
| do            | 3/16  | do                  | 3/16  | do                   | 3/16  |
| do            | 1/16  | do                  | 1/16  | do                   | 1/16  |
| mi            | 3/16  | mi                  | 3/16  | mi                   | 3/16  |
| mi            | 1/16  | mi                  | 1/16  | mi                   | 1/16  |
| fa            | 1/8   | fa                  | 1/8   | fe                   | 1/8   |
| sol           | 3/8   | sol                 | 1/4   | sol                  | 1/4   |
|               |       | rest                | 1/8   | sol                  | 1/8   |

A further similarity between the two songs is that each uses the triad for the same purpose. Plaintiff uses her Schultz figure repetitively as a two bar statement in bars 1 and 2, bars 9 and 10, and bars 25 and 26 (R. 236-237, 243-244) and follows the figure with a two bar "kind of little answer" to the statement bars (R. 237). Defendants also use the figure as a repetitive statement, but as a one bar statement in bars 1, 3, 5, 7, 9, 11, 13 and 15 (R. 237, 244) and follow the figure with a one bar answer (R. 237). Thus throughout both songs, the Schultz figure and its variations are used in all of the statements (R. 246-247).

At the trial, the plaintiff was unable to produce any direct evidence that the defendants had ever seen or copied her music. But in the argument which follows, the plaintiff

will urge that the striking novelty of the Schultz figure, and the similarities between the putative infringing bars and the Schultz figure, as well as other evidence, establishes by the weight of circumstances the irrefutable conclusion that the putative infringing bars were copied from the Schultz figure and that they had no other source. The District Court ruled to the contrary and made the following pertinent findings of fact (R. 56-59):

"5. Jack Holmes composed the words and music of the original musical compositions entitled 'Happy Pay Off Day' and 'The Blacksmith Blues.' Certificates of copyright on said 'Happy Pay Off Day' and 'The Blacksmith Blues' were applied for and issued by the United States Register of Copyrights."

"10. Plaintiff did not submit a copy of her compositions, or either of them, to Jack Holmes or to defendants, or any of them, prior to Jack Holmes' composition of 'Happy Pay Off Day' and 'The Blacksmith Blues,' as aforesaid."

"11. It is not true that Jack Holmes, or defendants, or any of them, had ever seen a copy, or heard a performance of plaintiff's compositions, or either of them, or in any other way were aware of the existence of plaintiff's composition prior to Jack Holmes' composition of 'Happy Pay Off Day' and 'The Blacksmith Blues,' as aforesaid."

"12. The first measure of 'Happy Pay Off Day' and of 'The Blacksmith Blues' utilizes some notes in common with the notes of the opening measures of 'Good Old Army' and 'Waitin' For My Baby'; insofar as such musical material in 'Happy Pay Off Day' and 'The Blacksmith Blues' bears any similarity to 'Good Old Army' or 'Waiting' For My Baby,' such musical material was not copied or prepared from plaintiff's compositions. The common utilization by different compositions of a few notes such as herein found to exist

occurs frequently in the field of popular music, particularly because of the limited number of pleasing tonal combinations within the average person's range of voice and skill."

"13. There are differences in the first measure of 'Happy Pay Off Day' and 'The Blacksmith Blues,' compared to the corresponding measures of 'Good Old Army' and 'Waitin' For My Baby'; these differences are apparent in each instance in which the musical material contained in said first measures appears elsewhere in said musical compositions. Among these differences are the use of a different passing tone between the mi and sol components of the triad upon which said first measures are constructed, and the fact that plaintiff's compositions contain a rest on the last half of the final count of their respective first measures whereas Jack Holmes' compositions do not."

"14. Because of these differences, the first measures of the respective compositions of plaintiff and Holmes, when performed, convey to the average listener, as well as to a person skilled in music, a substantially different musical sound, feeling and impression."

"15. The construction, modulations, phrasing, musical notes, and other musical material contained in 'Happy Pay Off Day' and 'The Blacksmith Blues' are not similar to that of 'Good Old Army' and 'Waitin' For My Baby.'"

"16. A performance of either 'Good Old Army' or 'Waitin' For My Baby' does not convey or give an impression to the average listener, of similarity or resemblance to 'Happy Pay Off Day' or 'The Blacksmith Blues,' in any particular or taken as a whole."

"17. Neither all of 'Happy Pay Off Day' or 'The Blacksmith Blues,' nor any part thereof, was copied or prepared from 'Good Old Army' or 'Waitin' For My Baby,' or any part thereof."

“18. It is not true that Jack Holmes or defendants, or any of them, have used the results of plaintiff's labors and incorporated the results thereof in ‘Happy Pay Off Day’ or ‘The Blacksmith Blues’ by the publishing, selling, and otherwise marketing of said compositions.”

The District Court thereupon entered its Conclusions of Law (R. 60) and its Judgment accordingly (R. 61-63). This appeal followed.

### **SPECIFICATION OF ERRORS**

1. The District Court erred in ordering, adjudging and decreeing that plaintiff, Mildred Becker Schultz, take nothing by her amended complaint herein.

2. The District Court erred in ordering, adjudging and decreeing that defendants have judgment for their costs of suit.

3. The District Court erred in finding that Jack Holmes composed the music of the compositions entitled “Happy Pay Off Day” and “The Blacksmith Blues” (Finding of Fact No. 5).

4. The District Court erred in finding that the musical compositions “Happy Pay Off Day” and “The Blacksmith Blues” were original with Jack Holmes (Finding of Fact No. 5).

5. The District Court erred in finding defendants herein, other than Jack Holmes, originally named as a defendant, are licensees and/or assignees of certain rights to publish, publicly perform for profit, record and distribute phonograph recordings of, and otherwise exploit, said “Happy Pay Off Day” and “The Blacksmith Blues” (Finding of Fact No. 6).

6. The District Court erred in finding that plaintiff did not submit a copy of her compositions, or either of them.

to Jack Holmes or to defendants, or any of them, prior to Jack Holmes' composition of "Happy Pay Off Day" and "The Blacksmith Blues," as aforesaid (Finding of Fact No. 10).

7. The District Court erred in finding that it is not true that Jack Holmes, or defendants, or any of them, had ever seen a copy, or heard a performance of plaintiff's compositions, or either of them, or in any other way were aware of the existence of plaintiff's compositions prior to Jack Holmes' composition of "Happy Pay Off Day" and "The Blacksmith Blues," as aforesaid (Finding of Fact No. 11).

8. The District Court erred in failing to find that plaintiff did disseminate her musical composition widely for purposes of consideration among musicians, arrangers, publishers and others in the musical industry.

9. The District Court erred in failing to find that defendants, and each of them, received copies of her musical composition.

10. The District Court erred in finding that insofar as musical material in "Happy Pay Off Day" and "The Blacksmith Blues" bears any similarity to "Good Old Army" or "Waitin' For My Baby," such musical material was not copied or prepared from plaintiff's compositions (Finding of Fact No. 12).

11. The District Court erred in finding that the common utilization by different compositions of a few notes such as herein found to exist occurs frequently in the field of popular music, particularly because of the limited number of pleasing tonal combinations within the average person's range of voice and skill (Finding of Fact No. 12).

12. The District Court erred in finding that, because of differences set forth in Finding 13, the first measure of the respective compositions of plaintiff and Holmes, when

performed, convey to the average listener, as well as to a person skilled in music, a substantially different musical sound, feeling and impression (Finding of Fact No. 14).

13. The District Court erred in finding that the construction, modulations, phrasing, musical notes, and other musical material contained in "Happy Pay Off Day" and "The Blacksmith Blues" are not similar to that of "Good Old Army" and "Waitin' For My Baby" (Finding of Fact No. 15).

14. The District Court erred in finding that a performance of either "Good Old Army" or "Waitin' For My Baby" does not convey or give an impression to the average listener, of similarity or resemblance to "Happy Pay Off Day" or "The Blacksmith Blues," in any particular or taken as a whole (Finding of Fact No. 16).

15. The District Court erred in finding that neither all of "Happy Pay Off Day" or "The Blacksmith Blues," nor any part thereof, was copied or prepared from "Good Old Army" or "Waitin' For My Baby," or any part thereof (Finding of Fact No. 17).

16. The District Court erred in finding that it is not true that Jack Holmes or defendants, or any of them, have used the results of plaintiff's labors and incorporated the results thereof in "Happy Pay Off Day" or "The Blacksmith Blues," by the publishing, selling, and otherwise marketing of said compositions (Finding of Fact No. 18).

17. The District Court erred in failing to find that Jack Holmes, alias Charles Douglas Hone, copied from plaintiff's copyrighted compositions "Good Old Army" or "Waitin' For My Baby" or from both of them when he wrote the music of the musical compositions entitled "Happy Pay Off Day" and "The Blacksmith Blues."

18. The District Court erred in failing to find that defendants, and each of them, used the results of plaintiff's

labors and incorporated such results in the infringing musical compositions "Happy Pay Off Day" and "The Blacksmith Blues."

19. The District Court erred in concluding that neither of the compositions, "Happy Pay Off Day" nor "The Blacksmith Blues," are infringements upon plaintiff's compositions "Good Old Army" or "Waitin' For My Baby" (Conclusion of Law No. II).

20. The District Court erred in failing to conclude that the compositions "Happy Pay Off Day" and "The Blacksmith Blues" are both infringements upon plaintiff's compositions "Good Old Army" and "Waitin' For My Baby."

21. The District Court erred in concluding defendants herein are not guilty of having engaged in unfair trade practices or unfair competition by their having published, sold, and otherwise marketed the compositions, "Happy Pay Off Day" and "The Blacksmith Blues" (Conclusion of Law No. III).

22. The District Court erred in concluding that defendants are entitled to judgment herein for their costs of suit incurred herein (Conclusion of Law No. IV).

23. The District Court erred in failing to find that plaintiff is entitled to judgment as prayed in the Amended Complaint filed March 18, 1955.

### **SUMMARY OF ARGUMENT**

In the argument plaintiff urges that Rule 52 does not preclude review of the findings of fact in this case because the controlling evidence is documentary and speaks for itself; the evidentiary facts are not in conflict or dispute; the answers to the questions presented do not turn upon the truth or falsity of the testimony of the witnesses and the only real issue is the ultimate legal conclusion to be drawn from the undisputed documentary evidence.



Plaintiff concedes in the argument that there can be no infringement of a copyright in the absence of actual copying and that there is no direct evidence that any of the defendants or their privies ever had actual access to plaintiff's works or that defendants or any of their privies actually copied any of the plaintiff's works.

Plaintiff argues that this lack of direct evidence is amply met by the circumstantial evidence in this case leading only to the sound conclusion that plaintiff's works were actually copied in producing the putative infringements. The undisputed evidence in this record discloses that there was an ample opportunity for copying because the works of plaintiff were publicly performed at a number of entertainment places in San Francisco and that the circulation of plaintiff's works extended to the Los Angeles area, where the defendants' works were first published, as well as elsewhere. The undisputed evidence further shows that there are a number of peculiarities in plaintiff's music which are reproduced verbatim in the alleged infringements. Finally the undisputed evidence discloses that no prior art music in the public domain supplies a source for all of the peculiarities found in common in the plaintiff's music and the defendants' music.

Plaintiff then argues as a matter of law that these undisputed facts establish internal circumstantial evidence of copying and that the courts accept such evidence as convincing proof of copying with consistent regularity in all forms of copyright infringement actions.

Plaintiff next turns to the specific findings of fact of the District Court and shows that they are clearly erroneous in part because they are without any evidentiary support and in part because they are based upon a misapprehension of the law.

Following the development of these points, plaintiff argues that the District Court should have entered judgment of infringement and should have awarded an accounting of damages and profits and asks this Court to reverse the judgment of the District Court and to direct the District Court to enter judgment for plaintiff.

### ARGUMENT

#### **Rule 52 Does Not Preclude Review of the Findings of Fact in This Case.**

At the outset, the plaintiff must face the effect of Rule 52 of the Federal Rules of Civil Procedure on the scope of this Court's review of the findings of fact in this case. Rule 52(a) provides in part:

“(a) Effect. In all actions tried upon the facts without a jury \* \* \*, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; \* \* \* Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. \* \* \*”

The pertinent rule of review is announced in *United States v. Gypsum Co.* (1948), 333 U.S. 364, at page 395:

“\* \* \* A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”

In the case at bar it will appear that there is no question as to the credibility of the witnesses. So far as the oral testimony of the plaintiff is concerned, she was her only witness and no effort was made to impeach any of her testi-

mony. So far as the oral testimony of the defendants is concerned, its material and relevant portions consisted entirely of expert testimony expository of the documentary evidence. The balance of the evidence consists of documentary evidence which speaks for itself. As to it, this Court has a well recognized and established right to draw its own conclusions.

In *Kuhn v. Princess Lida of Thurn & Taxis* (3rd Cir. 1941), 119 F.2d 704, the rule is said to include the following power, page 706:

“\* \* \* Where the evidentiary facts are not in conflict or dispute, the conclusions to be drawn therefrom are for the appellate court upon review of the trial court’s action. (citations omitted) An incorrect conclusion by a trial court qualifies as a ‘clearly erroneous’ finding, for the correction whereof on appeal Rule 52(a) specifically provides.”

The foregoing rules have an especial force in patent, trademark and copyright cases because in such cases the underlying evidence is usually documentary and the oral testimony is merely expository of the documents.

In an analogous patent case, Judge Stephens speaking for this Court in *Wire Tie Mach. Co. v. Pacific Box Corporation* (9th Cir. 1939), 102 F.2d 543 said at page 552:

“\* \* \* As a general rule this court will not overturn the findings of fact of the trial judge, since he has had an opportunity of hearing the witnesses testify and is in a better position than this court to judge their veracity. However, in a case such as the case at bar, the question of whether or not the subject matter constitutes invention does not turn upon the truth or falsity of the testimony of the witnesses. Their testimony of necessity is as to their opinions of whether it required more than mechanical skill to effect the combination of parts.”

In *Soy Food Mills v. Pillsbury Mills* (7th Cir. 1947), 161 F.2d 22, the rule on review is stated as follows, page 25:

“We are of the opinion that not only is the factual question thus open to the appellate court, but it is our unavoidable duty to examine the two trade-marks or trade-names or copyrights and decide the question of fact for ourselves. We must, however, give to the District Court’s opinion on such issues, consideration and weight because of its source.”

On the specific issue of copying and improper appropriation a pertinent dictum in *Arnstein v. Porter* (2nd Cir. 1946), 154 F.2d 464, states, page 469:

“Each of these two issues—copying and improper appropriation—is an issue of fact. If there is a trial, the conclusions on those issues of the trier of the facts—of the judge if he sat without a jury, or of the jury if there was a jury trial—bind this court on appeal, provided the evidence supports those findings, regardless of whether we would ourselves have reached the same conclusions. But a case could occur in which the similarities were so striking that we would reverse a finding of no access, despite weak evidence of access (or no evidence thereof other than the similarities); and similarly as to a finding of no illicit appropriation.”

The powers of review which this Court and other reviewing courts have announced as shown above are confirmed by U. S. Code, Title 28, Section 2106:

“The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.”

The plaintiff now will demonstrate to this Court that the foregoing rules are applicable to the review of the record at bar. As a prelude to the specific errors claimed at bar, the plaintiff turns to the salient portions of the case to establish a proper foundation for the argument.

### **Preliminary Chronology of Facts.**

In considering the circumstances, a preliminary chronology of facts may be helpful:

#### *April 7, 1941:*

Plaintiff obtained copyright registration for "Good Old Army" (Finding 2, R. 56). Plaintiff then "plugged" 500 copies of a piano arrangement of her tune in San Francisco night clubs and entertainment places (Pl. Exh. 3, Exh. Bk. 3-6, R. 82-90).

#### *May 29, 1942:*

Westmore Music Corporation of Los Angeles offered plaintiff a publishing agreement and royalty contract on her song. (Pl. Exh. 12, Exh. Bk. 17). "Pals of the Golden West" offered to record her tune (Pl. Exh. 14, Exh. Bk. 18).

#### *July 7, 1949:*

Plaintiff obtained copyright registration on "Waitin' For My Baby" (Finding 3, R. 56).

Plaintiff "plugged" a piano arrangement of "Waitin' For My Baby" (Pl. Exh. 6, Exh. Bk. 9-12) in San Francisco and Los Angeles (R. 94-104).

#### *November 2, 1949:*

Leeds Music Corporation by Lou Levy returned the plaintiff's song to her (Pl. Exh. 15, Exh. Bk. 19).

*January 25, 1950:*

Charles Douglas Hone obtained copyright registration on "Happy Pay Off Day" (R. 302).

*April 17, 1950:*

Charles Douglas Hone obtained copyright registration on "Happy Pay Off Day" (R. 302).

*January, 1952:*

Hill and Range Songs, Inc. started to publish "The Blacksmith Blues" (Pl. Exh. 8, Exh. Bk. 13-16, R. 22-23).

*January, 1952:*

Loew's Incorporated began to publish Art Mooney's recording of "The Blacksmith Blues" (R. 37-38).

*January 7, 1952:*

Capital Records, Inc. produced Ella Mae Morse's recording of "The Blacksmith Blues" (R. 14).

*February, 1952:*

Decca Records, Inc. began to publish Bill Barnell's recording of "The Blacksmith Blues" (R. 32).

*February, 1952:*

Decca Records, Inc. began to publish Sy Oliver's recording of "The Blacksmith Blues" (R. 32).

*February, 1952:*

Radio Corporation of America began to publish Elton Britt's recording of "The Blacksmith Blues" (R. 43).

*February, 1952:*

Columbia Records, Inc. produced Harry James' and Tony Harper's recording of "The Blacksmith Blues" (R. 49).

*February, 1952:*

Columbia Records, Inc. produced Leon McAuliffe's recording of "The Blacksmith Blues" (R. 49).

*March 1, 1952:*

Bob Hamilton trio played "The Blacksmith Blues" on station KRON-TV (Finding 7, R. 57).

*April 19, 1952:*

"Your Hit Parade" performed "The Blacksmith Blues" on station KRON-TV (Finding 8, R. 57).

*May, 1952:*

Radio Corporation of America produced Ralph Flanagan's recording of "The Blacksmith Blues" (R. 43).

*November 17, 1952:*

Plaintiff through her then attorney George B. White complained to Capital Records, Inc. of infringement (R. 16). Hill and Range Songs, Inc. and Rumbalero Music, Inc. received copies of the George B. White correspondence (R. 22).

*December 1, 1952:*

Capital Records, Inc. produced Eddie Bergman's recording of "The Blacksmith Blues" (R. 14).

With this chronology plaintiff now develops the argument.

**Copyright Infringement Requires Copying.**

In considering the undisputed facts, the plaintiff is mindful that she has the burden to prove that the defendants

actually copied the Schultz figure in the composition of "The Blacksmith Blues." For if "The Blacksmith Blues" is an independent work, it cannot be an infringement. The rule is stated tersely in *Mazer v. Stein* (1954), 347 U.S. 201, at page 218:

"\* \* \* Absent copying there can be no infringement of copyright. \* \* \*"

The plaintiff has conceded above, this brief page 6, that there is no direct evidence of copying. In the following portions of this brief, the plaintiff proposes to prove the fact of copying by the uncontroverted circumstantial evidence.

### **The Record Discloses Opportunity for Copying.**

One of the first essentials to copying a copyrighted work is that the alleged infringer must have had access to the work, for without access he would have had no opportunity for copying. In the case at bar, there is no direct evidence of access, but there is an abundance of evidence that the plaintiff produced and distributed enough copies of her work in the State of California to make the likelihood of access more than a mere possibility.

Without dispute it appears that the plaintiff printed 500 copies of a piano arrangement of "Good Old Army" (Pl. Exh. 3, Exh. Bk. 3-6; R. 79-80, 82). She took these copies every place she saw a band to see if she could plug it and create a demand (R. 83). She took her song to a number of places in San Francisco, including the Golden Gate Theatre, where she showed it to Maxine Andrews of the Andrews Sisters (R. 83-85); to the Lion's Den, where the piano player played it (R. 86); to the Forbidden City, where the arranger made an orchestration and the orchestra played it (R. 86); to the 365 Club, where the orchestra played it (R. 87); to the Seven Seas, where a marimba band played it (R. 87); to Monaco's, where Melba, an organist, played



it (R. 88) and to the Riviera, where June, an organist, played it (R. 88).

The parties stipulated that the plaintiff would testify that she took this music around to a number of the night spots and bars, and restaurants in the nature of bars and night clubs, and showed it to people there who played it and to some who didn't, and that it was played at a number of night clubs and night spots in San Francisco in 1941 (R. 88-89). Although the stipulation did not bind defendants to the facts, no effort was made to discredit the stipulated testimony.

Following her 1949 copyright registration for "Waitin' For My Baby" (Finding 3, R. 56), the plaintiff obtained 20 photostatic copies of an arrangement of this piece (Pl. Exh. 6, Exh. Bk. 9-12). The plaintiff took this version of her song to various night spots and entertainers in San Francisco. Specifically, the plaintiff took it to the Black Hawk night club; to the Eastman Trio; to Doc Evans and his Chicagoans at the Hangover Club; to Lionel Hampton at the Edgewater; to Walt Nobriega at the Palace Hotel; to Jack Ross at the Cirque Room of the Fairmont Hotel; to Billy Eckstein at The Say When Club; to Bunny Peterson; and to Leo Killion, who wrote the Hut-Sut Song (R. 91-99, 102-103). Pete Peterson of the Vagabonds, a small performing orchestra, came to the plaintiff to get the music (R. 99).

The plaintiff also took the music to Hollywood, where she showed it to someone at the RCA Victor Building; to an unknown arranger; to Maxine Andrews of the Andrews Sisters (R. 99-101).

The record also discloses that the circulation of her song was not limited to the places stated.

The Westmore Music Corporation offered plaintiff a publishing agreement and royalty contract for "Good Old Army Blues" on May 29, 1942 (Pl. Exh. 12, Exh. Bk. 17).

Pals of the Golden West offered to make a recording of "Good Old Army Blues" for the plaintiff (Pl. Exh. 14, Exh. Bk. 18).

Leeds Music Corporation of Radio City, New York, had a copy of the music which they returned to the plaintiff on November 2, 1949 (Pl. Exh. 15, Exh. Bk. 19).

The record does not disclose that Jack Holmes, who wrote the words and music for "The Blacksmith Blues", was in any of the night clubs and other places when plaintiff's music was performed, but it does appear that the plaintiff's music was widely circulated in California and that "The Blacksmith Blues" was published at Beverly Hills, California (Pl. Exh. 8, cover page, Exh. Bk. 13).

This Court can take judicial notice of the fact that the Los Angeles and the San Francisco areas are closely connected, within twelve hours by train and within two hours by airplane. Hence, in the absence of other evidence, opportunity of access stands proved on this record.

Moreover, Jack Holmes was a singer by trade (see Pl. Exh. 9, the Capital record of "Happy Pay Off Day" which recites "Vocal by Jack Holmes"). It is natural that one of the "plugged" copies of the plaintiff's music should eventually find its way into his hands, particularly since the "plugging" was directed to the entertainment field, of which Jack Holmes was a part.

Plaintiff next shows that the similarity between the Schultz figure and the putative infringing bars is so unique that the latter contain their own internal evidence of copying.

### **Defendants' Music Contains Its Own Internal Evidence of Copying.**

Plaintiff has conceded above that there is no direct evidence that Jack Holmes had ever actually seen any of plaintiff's music before he published "The Blacksmith Blues."

Similarly, plaintiff does not contend that the mere fact that the record discloses opportunity of access, as discussed at pages 20 to 22 of this brief, *per se* establishes the fact of access. In this section of the brief plaintiff argues that the alleged infringing music contains such identity with respect to a number of peculiarities not found in any prior publications so as to warrant only the conclusion that Jack Holmes must have copied the Schultz figure in composing "The Blacksmith Blues."

In making this argument, plaintiff must concede that the do-mi-sol triad, either with or without a passing note, is a well known musical form dating back at least as early as the French Revolution. And plaintiff does not complain that defendants have used a public domain form of the old do-mi-sol triad with a passing note. This litigation centers ENTIRELY upon the plaintiff's peculiar form of the well known triad and upon defendants' copying of that peculiar form in the putative infringements.

*The Putative Infringing Bars and the Schultz  
Figure Have Common Peculiarities*

A preliminary comparison of the Schultz figure with the putative infringing first bar is made earlier in this brief at pp. 4-5. The documents, speaking for themselves, show but minor variations—one, the substitution of a fe for a fa as the passing note, and the other, the substitution of a  $\frac{1}{8}$  sol for a  $\frac{1}{8}$  rest at the terminus of the triad. In all other respects there is complete identity.

The similarity does not stop with this single bar, but traces of the Schultz figure are found in other bars of "The Blacksmith Blues."

By way of further example, plaintiff compares bar 1 of "Good Old Army" (Pl. Exh. 2, Exh. Bk. 1), bar 9 of "Waitin' For My Baby" (Pl. Exh. 5, Exh. Bk. 7), and bar 5 of "The

Blacksmith Blues" (Pl. Exh. 8, Exh. Bk. 14) in downward descending order.



In all three bars, plaintiff notes that the do-mi-sol triad with the passing note uses the identical timing 3/16: 1/16: 3/16: 1/16: 1/8: 3/8. The only difference in "The Blacksmith Blues" is that the passing note of "The Blacksmith Blues" is a fe instead of a fa, and that the entire bar has been modulated or dropped a fourth of an octave (R. 203).

Another trace closely linking "The Blacksmith Blues" with the Schultz figure is found in the comparison of bar 9 of "Waitin' For My Baby" with bar 13 of "The Blacksmith Blues" as shown below.



The documents, thus speaking for themselves, show the peculiar timing for the mi and the passing note portions of

the triad, as well as a peculiar slur between the passing note portion and the sol portion. Plaintiff also notes that the mi portion of the triad occupies precisely the same location in "The Blacksmith Blues" bar 13 that it does in the Schultz figure of bar 9; that the passing note portion bears precisely the same position in the bar; that the slur occupies precisely the same position; and that the sol portion occupies precisely the same position in the bar.

A further similarity between the two songs is that the Schultz figure is used, with variations, in all of the statement portions of "Good Old Army" and "Waitin' For My Baby," and that in "The Blacksmith Blues" the do-mi-sol triad is likewise used in all of the statement portions of the music (R. 243-244, 246-247).

*The Common Peculiarities Are Not Found in the  
Prior Art in the Public Domain*

The experts for defendants were unable to produce any prior publications of any kind of music even closely approaching the peculiar similarities between the Schultz figure and the putative infringements.

One of the experts was George G. Schneider who has been employed in the plagiarism field for 27½ years and has been engaged in music research a total of 30 years (R. 149-150). Dr. Schneider made a comparative chart of representative bars from public domain sources (Def. Exh. D, Exh. Bk. 30, R. 159, 160). Dr. Schneider has one of the most extensive private music libraries in the United States (R. 172).

On cross examination, Dr. Schneider's attention was called to the 3/16 : 1/16 combination for the do portion of the triad found in common in "Good Old Army," "Waitin' For My Baby" and "The Blacksmith Blues", and he was

then asked the following question and gave the following answer (R. 177):

“Q. Now, do you know of any piece of sheet music having the do-mi-sol triad in which the do part of the triad comprises, as written and as played, both an E-flat dotted eighth and an E-flat sixteenth note?

A. I do not know offhand, no, sir.”

Dr. Schneider’s attention was next called to the 3/16 : 1/16 combination for the mi portion of the triad found in common in all three compositions, after which he was asked the following question and gave the following answer (R. 177):

“Q. Now, in a do-mi-sol triad—I am using it as you and I have used it in our examination so far—are you aware of any prior art music in which there appear for the mi part of the triad a specific combination of a G-dotted eighth and a G-sixteenth note?

A. Offhand, I do not.”

Inspection of the prior art public domain material supplied by Dr. Schneider makes clear that the prior publications are equally deficient in the passing note having a  $\frac{1}{8}$  value, whether it be fa or fe, and that they are equally deficient in supplying the sol component in the final  $\frac{3}{8}$  of the bar.

Defendants’ other expert, David Raksin, is a composer, conductor, orchestrator, arranger, researcher and lecturer (R. 205). He also was unable to find in any of the prior art publications the note time values found in common in the Schultz figure and the putative infringements. He explained the deficiencies of the prior art as follows (R. 259):

“Let me say ‘oeuf’ and ‘enough,’ or ‘huff’ and ‘enough.’ Huff is spelled h-u-f-f. Enough is spelled e-n-o-u-g-h. And I defy anybody to tell the difference between ‘oeuf’ and ‘huff’ and ‘o-u-g-h’ and ‘enough.’

They are the same thing. And o-e-u-f is French, oeuf, ough as we say it. These are the same things."

But in the case at bar, he was unable to find in any of the prior usage the peculiar musical spelling the same as that which is now found in common in the plaintiff's and defendants' works.

Mr. Raksin was aided in his deliberations by a chart prepared by Harold Barlow (R. 228, Def. Exh. E, Exh. Bk. 31-37). This exhibit likewise on its face fails to disclose any prior art examples having the precise and peculiar timing of the Schultz figure and the putative infringements.

*The Law Accepts Proof of Common Peculiarities  
as Proof of Copying*

Under the foregoing circumstances, plaintiff submits that "The Blacksmith Blues," speaking for itself, demonstrates that its peculiar do-mi-sol triad must have been copied from the Schultz figure—for there is no other source for the figure. The Schultz figure alone discloses so many peculiarities found in common with the putative infringements. The combination of these circumstances spells actual copying rather than independent composition. Plaintiff's form of musical spelling is peculiar to the Schultz figure and to the putative infringement and is wholly lacking in the prior art found in the public domain.

Plaintiff applies the principle set forth in *Castle v. Bullard* (1860), 23 How. (64 U.S.) 172. In that case, certain evidence on a particular issue was circumstantial, and the Court laid down the rule to be applied as follows, page 187:

"\* \* \* Much of the evidence was of a circumstantial character; and it is not going too far to say, that some of the circumstances adduced, if taken separately, might well have been excluded. Actions of this descrip-

tion, however, where fraud is of the essence of the charge, necessarily give rise to a wide range of investigation, for the reason that the intent of the defendant is, more or less, involved in the issue. Experience shows that positive proof of fraudulent acts is not generally to be expected, and for that reason, among others, the law allows a resort to circumstances, as the means of ascertaining the truth. Great latitude, says Mr. Starkie, is justly allowed by the law to the reception of indirect or circumstantial evidence, the aid of which is constantly required, not merely for the purpose of remedying the want of direct evidence, but of supplying an invaluable protection against imposition. 1 Stark, Ev., p. 58.

“Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the grounds of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof. \* \* \*”

In *The Robert Edwards* (1821), 6 Wheat. (19 U.S.) 187, the Court said, page 190:

“\* \* \* we are not to shut our eyes on circumstances, which sometimes carry with them a conviction, which the most positive testimony will sometimes fail to produce. \* \* \*”

*Rogers v. Missouri Pacific Railroad Company* (1957), 352 U.S. 500, states, footnote 17:

“Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.”



The application of the rule in proving identity has been stated as follows:

“The process of constructing an inference of Identity thus consists usually in adding together a number of circumstances, each of which by itself might be a feature of many objects, but all of which together make it more probable that they coexist in a single object only. Each additional circumstance reduces the chances of there being more than one object so associated. The process thus corresponds accurately to the principle of Relevancy (citation omitted).”

II *Wigmore on Evidence* 386, sec. 411.

The circumstantial evidence rule is applied with consistent regularity in copyright infringement cases, as appears from the following quotations:

“\* \* \* you cannot have better evidence of such copying than the circumstance which occurs in several of the passages here complained of—namely, the fact of blunders in the original book being transferred into the book accused of piracy.”

*Mawman v. Tegg* (1826), 2 Russ. 385, 394, 38 Eng. Rep. 380, 384.

“Upon the question of infringement there is not much room for doubt. The theme or melody of the music is substantially the same in the copyrighted and the alleged infringing pieces. The measure of the former is followed in the latter, and is somewhat peculiar. When played by a competent musician, they appear to be really the same. There are variations, but they are so placed as to indicate that the former was taken deliberately, rather than that the latter was a new piece.”

*Blume v. Spear* (S.D.N.Y. 1887), 30 Fed. 629, 631.

“In a case like this, when a close resemblance is the necessary consequence of the use of common materials,

the existence of the same errors in the two publications affords one of the surest tests of copying. The improbability that both compilers would have made the same mistakes, if both had derived their information from independent sources, suggests such a cogent presumption of copying by the later compiler from the first that it can be overcome only by clear evidence to the contrary." (Citations omitted.)

*List Pub. Co. v. Keller* (S.D.N.Y. 1887), 30 Fed. 772, 774.

"\* \* \* The record discloses no \* \* \* evidence \* \* \* that the similarity of defendants' to complainant's articles was due to their both having been derived from common sources, \* \* \* much less supported by any evidence. \* \* \*"

*Werner v. Encyclopaedia Britannica Co.* (3rd Cir. 1905), 134 Fed. 831, 832.

"We think that the proof of a considerable number of errors common to both publications occurring first in the complainant's and none occurring first in the defendant's created a prima facie case of copying by the defendant which it was bound to explain."

*Frank Shepard Co. v. Zachary P. Taylor Pub. Co.* (2nd Cir. 1912), 193 Fed. 991, 993.

"\* \* \* If characters, incidents, omissions, or additions are found in the complainant's dramatization, not found in the published book or common source, then, in the absence of a convincing explanation, the court is justified in finding, and invariably does find, the complainant's work has been infringed. (citations omitted)."

*O'Neill v. General Film Co.* (1915), 152 N.Y.S. 599, 602; affirmed in part and modified on other grounds *O'Neill v. General Film Co.* (1916), 157 N.Y.S. 1028.

"In deciding the question of infringement, the first and most obvious thing to do is to compare the productions themselves. The copyrightable feature of appellant's production being a particular plan, arrangement, and combination of similar materials, found in appellee's production, not only suggests, but establishes, the claim of copying."

*Edwards & Deutsch Lithographing Co. v. Boorman*  
(7th Cir. 1926), 15 F.2d 35, 36.

"\* \* \* In view of the great improbability of two workers finding the same needle in a wordy haystack, as well as other equally striking coincidences and some unmistakable improprieties, we conclude that defendant's annotator at the very least derived considerable assistance from the mental labors of his rival. \* \* \*"

*W. H. Anderson Co. v. Baldwin Law Pub. Co.* (6th Cir. 1928), 27 F.2d 82, 87.

"From the entire record, we can find no possible explanation of the mistakes common to both maps, particularly those which do not appear on defendants' alleged base maps, except direct copying."

*General Drafting Co. v. Andrews* (2nd Cir. 1930), 37 F.2d 54, 57.

"\* \* \* the charge of infringement does not fail merely because the infringer is not caught in the act, for access may be inferred or found circumstantially from the plan, the arrangement, and the combination of materials contained in the composition. \* \* \* Internal proof of access may rest in an identity of words or in the parallel character of incidents or in a striking similarity which passes the bounds of mere accident."

*Wilkie v. Santly Bros.* (2nd Cir. 1937), 91 F.2d 978, 979.

“\* \* \* Hartfield has brought to our attention phrases, sequences, singularities and errors which appear in his 1912 code and, so far as the record indicates, have appeared nowhere else, and has shown that they have been reproduced in Peterson’s 1929 publication. This shows an infringement not only of these passages as a part of Hartfield’s code but of Hartfield’s compilation as a whole which cannot be invaded by the appropriation of any material part of it.”

*Hartfield v. Peterson* (2nd Cir. 1937), 91 F.2d 998, 1000.

“\* \* \* It is unbelievable that the complete identity of choice was a matter of coincidence. \* \* \*”

*College Entrance Book Co., Inc. v. Amsco Book Co.* (2nd Cir. 1941), 119 F.2d 874, 875.

“\* \* \* a case could occur in which the similarities were so striking that we would reverse a finding of no access, despite weak evidence of access (or no evidence thereof other than the similarities); \* \* \*.”

*Arnstein v. Porter* (2nd Cir. 1946), 154 F.2d 464, 469.

“The accused song bears the kind of similarity to plaintiff’s song which, by standards set up by the Court of Appeals of this Circuit indicates internal evidence of copying even in the absence of proof of access. \* \* \*”

*Baron v. Leo Feist, Inc.* (S.D.N.Y. 1948), 78 F. Supp. 686, 689, aff’d. (2d Cir. 1949) 173 F.2d 288.

“\* \* \* Some of them (the words) are so unusual that we cannot believe the similarity was merely the result of chance.”

*Wihtol v. Wells* (7th Cir. 1956), 231 F.2d 550, 552.

“\* \* \* There was no direct evidence that defendant Kaczmarek had access to plaintiffs’ song, but the charge of infringing does not fail merely because the infringer was not caught in the act for access may be inferred, or found circumstantially. \* \* \*”

*Cholvin v. B. & F. Music Co.* (7th Cir. 1958), 253 F.2d 102, 103.

*The Foregoing Law Is Particularly  
Pertinent in this Case.*

In this case we have already discussed the several common elements which are found in plaintiff’s and defendants’ works and which are not found in the prior art musical compositions available in the public domain. A recapitulation of the several similarities in the light of the foregoing authorities makes it unbelievable that the complete identity of choice in these several peculiarities was a matter of coincidence. Some of the peculiarities are so unusual that the similarity could not have been merely the result of chance. We call the attention of the Court particularly to the following:

*First:* In bars 1, 3, 5, 7, 11 and 15 of “The Blacksmith Blues,” a  $3/16$  (dotted one-eighth) *do* occupies the first  $3/4$  of the first beat of the bar. This same concept is found earlier in bars 1, 2, 9, 10, 25 and 26 of “Good Old Army” and bars 1, 2, 9, 25 and 26 of “Waitin’ For My Baby.” This is a total of six precise  $3/16$  *do* component positions and timings.

*Second:* In bars 1, 3, 5, 7, 11 and 15 of “The Blacksmith Blues,” a  $1/16$  *do* occupies the last  $1/4$  of the first beat of the bar. This same concept is found earlier in bars 1, 2, 9, 10, 25 and 26 of “Good Old Army” and in bars 1, 9 and 25 of “Waitin’ For My Baby.” This is a total of six precise  $1/16$  *do* component positions and timings.

*Third:* In bars 1, 3, 5, 7, 9, 11, 13 and 15 of “The Blacksmith Blues,” a  $3/16$  (dotted one-eighth) *mi* occupies the

first  $\frac{3}{4}$  of the second beat of the bar. This same concept is found earlier in bars 1 and 2 of "Good Old Army" and in bars 1, 9 and 25 of "Waitin' For My Baby." This is a total of eight precise  $\frac{3}{16}$  *mi* component positions and timings.

*Fourth:* In bars 1, 3, 5, 9, 11 and 13 of "The Blacksmith Blues," a  $\frac{1}{16}$  *mi* occupies the final  $\frac{1}{4}$  of the second beat of the bar. This same concept is found earlier in bars 1 and 2 of "Good Old Army" and bars 1, 9 and 25 of "Waitin' For My Baby." This is a total of six precise  $\frac{1}{16}$  *mi* component positions and timings.

*Fifth:* In bars 1, 3, 5, 9, 11 and 13 of "The Blacksmith Blues," a  $\frac{1}{8}$  *passing note* (fe) occupies the first half of the third beat of the bar. This same concept is found earlier in the passing note (fa) of bars 1 and 2 of "Good Old Army" and bars 1, 9 and 25 of "Waitin' For My Baby." This is a total of six precise  $\frac{1}{8}$  *passing note* component positions and timings.

*Sixth:* In bar 13 of "The Blacksmith Blues," a *slur* connects the passing note component with the sol component and ties together the first half and the second half of the third beat of the bar. This same concept is found earlier in bar 9 of "Waitin' For My Baby." This is one precise *slur* component position.

*Seventh:* In bars 1, 9 and 13 of "The Blacksmith Blues," a  $\frac{1}{4}$  *sol* occupies the last half of the third beat and the first half of the fourth beat of the bar. This same concept is found earlier in bar 26 of "Good Old Army" and in bars 1, 9 and 25 of "Waitin' For My Baby." This is a total of three precise  $\frac{1}{4}$  *sol* component positions and timings.

*Eighth:* In bar 5 of "The Blacksmith Blues," a  $\frac{3}{8}$  (dotted  $\frac{1}{4}$ ) *sol* occupies the last half of the third beat and the entire fourth beat of the bar. This same concept is found earlier in bars 1 and 2 of "Good Old Army." This is one precise  $\frac{3}{8}$  *sol* component position and timing.

*Ninth:* In bar 1 of "The Blacksmith Blues," the *syncopation* of the entire bar is exactly  $3/16: 1/16: 3/16: 1/16: 1/8: 1/4: 1/8$ . The same syncopation is found earlier in bars 1 and 25 of "Waitin' For My Baby." This is one instance of complete bar precise *syncopation*.

*Tenth:* In bar 5 of "The Blacksmith Blues," the *syncopation* of the entire bar is exactly  $3/16: 1/16: 3/16: 1/16: 1/8: 3/8$ . The same exact syncopation is found earlier in bars 1 and 2 of "Good Old Army" and in bar 9 of "Waitin' For My Baby." This is one instance of complete bar precise *syncopation*.

*Eleventh:* In "The Blacksmith Blues," the triad is used repetitively for each *statement* of the song. The same concept is found earlier in "Good Old Army."

In recapitulation, if each of the foregoing common points be weighted evenly as a factor, bars 1 and 5 of "The Blacksmith Blues" each has seven factors in common with plaintiff's music; bars 3, 11 and 13 of "The Blacksmith Blues" each has five factors in common; bar 9 has four factors in common; and bars 7 and 15 each has three factors in common, for a total of 39 common factors, 36 of which are common notes. When one considers that "The Blacksmith Blues" has only 103 notes (R. 235), this is a concordance of 34.9% in note positioning and timing alone.

Plaintiff, therefore, submits that access and actual copying are provable and have been proved in this case by the internal evidence in the defendants' music itself.

### **Finding 5 Is Clearly Erroneous.**

Finding 5 recites:

"5. Jack Holmes composed the words and music of the original musical compositions entitled 'Happy Pay Off Day' and 'The Blacksmith Blues.' Certificates of copyright on said 'Happy Pay Off Day' and 'The Black-

smith Blues' were applied for and issued by the United States Register of Copyrights." (R. 56)

In considering this finding, plaintiff has made two specifications of error:

"3. The District Court erred in finding that Jack Holmes composed the music of the compositions entitled 'Happy Pay Off Day' and 'The Blacksmith Blues.'

"4. The District Court erred in finding that the musical compositions 'Happy Pay Off Day' and 'The Blacksmith Blues' were original with Jack Holmes."

With respect to specification 3, there is no evidence that Jack Holmes composed the music. As a matter of fact, defendants introduced no evidence whatsoever concerning the composership of the defendants' works. The mere statement "Words and Music by Jack Holmes" appearing upon the sheet music of "The Blacksmith Blues" (Pl. Exh. 8, Exh. Bk. 13, 14), as well as words of similar import appearing upon other alleged infringements, should have no probative effect upon the question of composership. This is particularly true in view of the circumstantial evidence that the Schultz figure was copied in producing the defendants' alleged infringing music.

By the same token, there is no evidence that the musical compositions were "original" with Jack Holmes as recited in said Finding 5.

#### **Finding 6 Is Clearly Erroneous.**

Finding 6 recites:

"6. Defendants herein, other than Jack Holmes, originally named as defendant, are licensees and/or assignees of certain rights to publish, publicly perform for profit, record and distribute phonograph recordings of, and otherwise exploit, said 'Happy Pay Off Day' and 'The Blacksmith Blues.' " (R. 56)



Specification of error 5 directed to this finding recites:

“5. The District Court erred in finding defendants herein, other than Jack Holmes, originally named as a defendant, are licensees and/or assignees of certain rights to publish, publicly perform for profit, record and distribute phonograph recordings of, and otherwise exploit, said ‘Happy Pay Off Day’ and ‘The Blacksmith Blues.’ ”

Finding 6 is without record support. There is of record no license or assignment from plaintiff granting defendants the right to publish the putative infringing music, nor is there any license or assignment from anyone else claiming under the plaintiff. This finding is, therefore, without record support and hence is clearly erroneous.

**Findings 10, 11, 12 (First Part), 17 and 18 Are Clearly Erroneous.**

The foregoing findings may be considered as a group, insofar as the same considerations apply to each of them. They recite (R. 57 to 59):

“10. Plaintiff did not submit a copy of her compositions, or either of them, to Jack Holmes or to defendants, or any of them, prior to Jack Holmes’ composition of ‘Happy Pay Off Day’ and ‘The Blacksmith Blues,’ as aforesaid.

“11. It is not true that Jack Holmes, or defendants, or any of them, had ever seen a copy, or heard a performance of plaintiff’s compositions, or either of them, or in any other way were aware of the existence of plaintiff’s composition prior to Jack Holmes’ composition of ‘Happy Pay Off Day’ and ‘The Blacksmith Blues,’ as aforesaid.

“12 The first measure of ‘Happy Pay Off Day’ and of ‘The Blacksmith Blues’ utilizes some notes in common with the notes of the opening measures of ‘Good Old Army’ and ‘Waitin’ For My Baby’; insofar as such musical material in ‘Happy Pay Off Day’ and

'The Blacksmith Blues' bears any similarity to 'Good Old Army' or 'Waitin' For My Baby,' such musical material was not copied or prepared from plaintiff's compositions. \* \* \*

"17. Neither all of 'Happy Pay Off Day' or 'The Blacksmith Blues,' nor any part thereof, was copied or prepared from 'Good Old Army' or 'Waitin' For My Baby,' or any part thereof.

"18. It is not true that Jack Holmes or defendants, or any of them, have used the results of plaintiff's labors and incorporated the results thereof in 'Happy Pay Off Day' or 'The Blacksmith Blues' by the publishing, selling, and otherwise marketing of said compositions."

The specifications of error directed to the foregoing findings recite:

"6. The District Court erred in finding that plaintiff did not submit a copy of her compositions, or either of them, to Jack Holmes or to defendants, or any of them, prior to Jack Holmes' composition of 'Happy Pay Off Day' and 'The Blacksmith Blues,' as aforesaid.

"7. The District Court erred in finding that it is not true that Jack Holmes, or defendants, or any of them, had ever seen a copy, or heard a performance of plaintiff's compositions, or either of them or in any other way were aware of the existence of plaintiff's compositions prior to Jack Holmes' composition of 'Happy Pay Off Day' and 'The Blacksmith Blues,' as aforesaid.

"8. The District Court erred in failing to find that plaintiff did disseminate her musical composition widely for purposes of consideration among musicians, arrangers, publishers and others in the musical industry.

"9. The District Court erred in failing to find that defendants, and each of them, received copies of her musical composition.

"10. The District Court erred in finding that insofar as musical material in 'Happy Pay Off Day' and 'The Blacksmith Blues' bears any similarity to 'Good Old Army' or 'Waitin' For My Baby,' such musical material was not copied or prepared from plaintiff's compositions.

"15. The District Court erred in finding that neither all of 'Happy Pay Off Day' or 'The Blacksmith Blues,' nor any part thereof, was copied or prepared from 'Good Old Army' or 'Waitin' For My Baby,' or any part thereof.

"16. The District Court erred in finding that it is not true that Jack Holmes or defendants, or any of them, have used the results of plaintiff's labors and incorporated the results thereof in 'Happy Pay Off Day' or 'The Blacksmith Blues,' by the publishing, selling, and otherwise marketing of said compositions.

"17. The District Court erred in failing to find that Jack Holmes, alias Charles Douglas Hone, copied from plaintiff's copyrighted compositions 'Good Old Army' or 'Waitin' For My Baby' or from both of them when he wrote the music of the musical compositions entitled 'Happy Pay Off Day' and 'The Blacksmith Blues.'

"18. The District Court erred in failing to find that defendants, and each of them, used the results of plaintiff's labors and incorporated such results in the infringing musical compositions 'Happy Pay Off Day' and 'The Blacksmith Blues.'"

Plaintiff submits that each of the foregoing findings is clearly erroneous, because each is based upon a misconception of the law of circumstantial evidence as to copying, which improperly placed upon plaintiff the burden of the evidence.

The District Court was apparently of the view that direct evidence of submission was essential in order to prove copying. Plaintiff submits that the evidence showing exten-

sive promotion of plaintiff's music in the California area coupled with the internal evidence of copying is sufficient to dispense with proof of actual submission. As stated in *Arnstein v. Porter* (2nd Cir. 1946), 154 F.2d 464, 469:

“\* \* \* a case could occur in which the similarities were so striking that we would reverse a finding of no access, despite weak evidence of access (or no evidence thereof other than the similarities); \* \* \*”

Or as stated otherwise in *Wilkie v. Santly Bros.* (2nd Cir. 1937), 91 F.2d 978, 979:

“\* \* \* the charge of infringement does not fail merely because the infringer is not caught in the act, for access may be inferred or found circumstantially from the plan, the arrangement, and the combination of materials contained in the composition. \* \* \*”

In this case, defendants have made no explanation concerning the similarity of materials. Plaintiff submits that defendants had the burden of proof on this issue in view of the striking similarity between the Schultz figure and the putative infringements. The rule as to the burden of evidence is stated in *Frank Shepard Co. v. Zachary P. Taylor Pub. Co.* (2nd Cir. 1912), 193 Fed. 991, 993:

“The burden of proof, it is true, was on the complainant throughout, but on this state of the case the burden of evidence—that is, of explanation—was on the defendant.”

And in the case at bar, plaintiff submits that the trial court erred as a matter of law in finding no submission and no copying. In view of the opportunity of access and in view of the similarities, proper application of the rule on circumstantial evidence and burden of evidence would have resulted in contrary findings.

### **Finding 12 (Last Part) Is Clearly Erroneous.**

The last part of finding 12 recites (R. 58) :

“12. \* \* \* The common utilization by different compositions of a few notes such as herein found to exist occurs frequently in the field of popular music, particularly because of the limited number of pleasing tonal combinations within the average person’s range of voice and skill.”

Specification 11 recites :

“11. The District Court erred in finding that the common utilization by different compositions of a few notes such as herein found to exist occurs frequently in the field of popular music, particularly because of the limited number of pleasing tonal combinations within the average person’s range of voice and skill.”

Plaintiff submits that there is no evidence in support of this part of finding 12. It has been shown above that the precise combination of the Schultz figure and the peculiarities found in common with the Schultz figure and the putative infringement are not found in any of the prior art public domain sources. This, notwithstanding the combined efforts of Dr. George G. Schneider, David Raksin and Howard Barlow. Notwithstanding the plethora of prior art domi-sol triads found in the public domain, not a one showed the common utilization of the notes herein found to exist. Not having appeared a single time, it cannot be said that such a similarity “occurs frequently in the field of popular music.”

### **Findings 14, 15 and 16 Are Clearly Erroneous.**

Findings 14, 15 and 16 recite (R. 59) :

“14. Because of these differences [those specified in finding 13], the first measures of the respective compositions of plaintiff and Holmes, when performed,

convey to the average listener, as well as to a person skilled in music, a substantially different musical sound, feeling and impression.

"15. The construction, modulations, phrasing, musical notes, and other musical material contained in 'Happy Pay Off Day' and 'The Blacksmith Blues' are not similar to that of 'Good Old Army' and 'Waitin' For My Baby.'

"16. A performance of either 'Good Old Army' or 'Waitin' For My Baby' does not convey or give an impression to the average listener, of similarity or resemblance to 'Happy Pay Off Day' or 'The Blacksmith Blues,' in any particular or taken as a whole."

The specifications of error directed to these findings recite:

"12. The District Court erred in finding that, because of differences set forth in Finding 13, the first measure of the respective compositions of plaintiff and Holmes, when performed, convey to the average listener, as well as to a person skilled in music, a substantially different musical sound, feeling and impression.

"13. The District Court erred in finding that the construction, modulations, phrasing, musical notes, and other musical material contained in 'Happy Pay Off Day' and 'The Blacksmith Blues' are not similar to that of 'Good Old Army' and 'Waitin' For My Baby.'

"14. The District Court erred in finding that a performance of either 'Good Old Army' or 'Waitin' For My Baby' does not convey or give an impression to the average listener, of similarity or resemblance to 'Happy Pay Off Day' or 'The Blacksmith Blues,' in any particular or taken as a whole [whole]."

It is true as stated in finding 13 that there is a slight difference in pitch in the passing note, the Schultz figure using a fa and "The Blacksmith Blues" using a fe. But finding 14 fails to recognize that the passing notes are of

precisely the same length and are in precisely the same location in the bar.

It is also true that the Schultz figure contains a rest on the last half of the final count of the first measure in "Waitin' For My Baby." But finding 14 fails to recognize that the sol portion of the triad occupies the final  $\frac{3}{8}$  of the measure in bars 1 and 2 of "Good Old Army" in precisely the same manner as it does later in bar 5 of "The Blacksmith Blues", save for a modulation in the pitch of the entire bar.

The undisputed documentary evidence shows the substantial similarity in notes of the Schultz figure and the putative infringements in at least 36 particulars. Since the note placement and timing is identical with the exception of the minor variations in the precise pitch of the passing note and the use of the last  $\frac{1}{8}$  of the measure, it is submitted that the "not similar" thought of finding 15 and the "in any particular" portion of finding 16 must fail both as a matter of law and as lacking in evidentiary support.

In making the findings the Court was guided in part by evidence which included a measure-by-measure playing of the two pieces (R. 206-219). The defendants' experts did not play any of the music through in its entirety as a whole. The "taken as a whole" portion of finding 16 is, therefore, entirely without evidentiary support.

Each of the foregoing findings is based upon the premise that the defendants' music does not copy the plaintiff's music as a whole, the only similarity being in the use of the Schultz figure. In this, the District Court erred as a matter of law.

With respect to the use of the Schultz figure rather than the entire musical composition, plaintiff refers to the authorities set forth at pp. 29-33 of this brief. In addition,

plaintiff calls the attention of the Court to U. S. Code, Title 17, Section 3, the pertinent portion of which recites:

“The copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. \* \* \*”

As this Court has said of a burlesque in *Benny v. Loew's Incorporated* (9th Cir. 1956), 239 F.2d 532, 537; aff'd. (1958), 356 U.S. 43:

“\* \* \* One cannot copy the substance of another's work without infringing his copyright. \* \* \*”

If the foregoing rule applies to the burlesque of an original work, certainly it should apply to the slight variation of notes found in the case at bar.

That a copyrightable component part of a musical theme includes the repetitious use of a single bar of music is made clear from *Fred Fisher, Inc. v. Dillingham* (S.D.N.Y. 1924), 298 Fed. 145 in which the infringement consisted entirely in the repetitious use of a single bar of the copyrighted work. At page 148, Judge Learned Hand, while still on the district bench, said:

“\* \* \* Musical melody is single, the sense of the earlier notes carrying over into those which succeed. Repetition is in substance the same in this respect, the effect upon the ear being entirely different when the figure is rolled over and over again. \* \* \*”

The notes of the figure before the Court in the *Fred Fisher* case are not shown in the reported decision. However, plaintiff invites the attention of the Court to *Musical Copyright* by Shafter, page 168. There the copyrighted figure and the putative infringement are shown side by side.

Plaintiff submits that there is greater similarity between



the figures in this case than there was in the *Fred Fisher* case.

Indeed, the differences between the Schultz figure and the putative infringing bars are so slight as to make applicable the thought of *Blume v. Spear* (S.D.N.Y. 1887), 30 Fed. 629, 631:

“\* \* \* There are variations, but they are so placed as to indicate that the former was taken deliberately, rather than that the latter was a new piece.”

The same principle was applied to the lifting of but 57 scenes comprising only 20% of an entire feature in *Universal Pictures Co. v. Harold Lloyd Corporation* (9th Cir. 1947), 162 F.2d 354, where Judge Stephens in speaking for the Court, said at page 361:

“The whole picture need not be copied to constitute infringement. The mere copying of a major sequence is sufficient. \* \* \*”

And so in the case at bar, the Schultz figure comprises a major sequence of both the Schultz music and the putative infringements. If the 20% usage of *Universal* is sufficient then it follows that the 34.9% in the case at bar should be sufficient.

The foregoing rule is not singular to this circuit. For example, in *King Features Syndicate v. Fleischer* (2nd Cir. 1924), 299 Fed. 533 the Court said, page 535:

“\* \* \* Copying is not confined to a literary repetition, but includes various modes in which the matter of any publication may be adopted, imitated, or transferred with more or less colorable alteration. The disguise of the source from which the material was derived does not defeat the protection of the copyright, nor does taking a part of the work constitute an evasion of the copyright. (citation omitted). The appellees did not take all of the copyrighted matter, or all its principal

characters, but took one, the idea of the horse 'Sparky.' "

Or, as stated otherwise in *Chicago Record-Herald Co. v. Tribune Ass'n.* (7th Cir. 1921), 275 Fed. 797, 799:

"\* \* \* the transgression in its unauthorized appropriation is not to be neutralized on the plea that 'it is such a little one.' "

**The District Court Should Have Entered Judgment of Infringement and Awarded an Accounting of Damages and Profits.**

The ultimate errors specified in the decision below are (R. 313, 317-318) :

"1. The District Court erred in ordering, adjudging and decreeing that plaintiff, Mildred Becker Schultz, take nothing by her amended complaint herein.

"2. The District Court erred in ordering, adjudging and decreeing that defendants have judgment for their costs of suit.

"19. The District Court erred in concluding that neither of the compositions, 'Happy Pay Off Day' nor 'The Blacksmith Blues,' are infringements upon plaintiff's compositions 'Good Old Army' or 'Waitin' For My Baby.'

"20. The District Court erred in failing to conclude that the compositions 'Happy Pay Off Day' and 'The Blacksmith Blues' are both infringements upon plaintiff's compositions 'Good Old Army' and 'Waitin' For My Baby.'

"21. The District Court erred in concluding defendants herein are not guilty of having engaged in unfair trade practices or unfair competition by their having published, sold, and otherwise marketed the compositions, 'Happy Pay Off Day' and 'The Blacksmith Blues.'

"22. The District Court erred in concluding that defendants are entitled to judgment herein for their costs of suit incurred herein.

"23. The District Court erred in failing to find that plaintiff is entitled to judgment as prayed in the Amended Complaint filed March 18, 1955."

Plaintiff has shown above :

1. that there was an ample opportunity for defendants to copy plaintiff's music;
2. that the documents themselves show internal evidence of copying;
3. that the public domain materials do not disclose the peculiar similarities between the Schultz figure and the putative infringements; and
4. that the putative infringements are a substantial use of the Schultz figure.

As a consequence, under the cases cited, plaintiff submits that the conclusions of law are in error and that plaintiff was entitled to judgment under U.S. Code, Title 17, Section 101 for injunctive relief, for damages and profits, and for other remedies.

### **CONCLUSION**

In conclusion, plaintiff asks that the judgment of the District Court be reversed and that the District Court be directed to enter judgment for plaintiff.

Respectfully submitted,

CARL HOPPE

THOMAS P. MAHONEY

JAMES F. MITCHELL

*Attorneys for Appellant*







## Appendix

| Plaintiff's<br>Exhibit No. | Description   | Record Page No. |         |          | Printed<br>Exhibit B |
|----------------------------|---|-----------------|---------|----------|----------------------|
|                            |   | Identified      | Offered | Received |                      |
| 1                          | Certificate of Copyright, Registration No. E 254497, dated April 7, 1941, "Good Old Army"                                 | 72              | 72      | 76       |                      |
| 2                          | Copy of words and music, entitled "Good Old Army", bearing Library of Congress Copyright Deposit stamp                    | 72              | 72      | 76       | 1                    |
| 3                          | Sheet Music entitled "Good Old Army"  | 73              | 90      | 90       | 3                    |
| 4                          | Certificate of Copyright, Registration No. E 172341, dated July 7, 1949, "Waitin' For My Baby"                            | 73              | 73      | 76       |                      |
| 5                          | Copy of words and music entitled "Waitin' For My Baby" bearing Library of Congress Copyright Deposit stamp                | 73              | 73      | 76       | 7                    |
| 6                          | Sheet music entitled "Waitin' For My Baby"  | 73              | 108     | 109      | 9                    |
| 7                          | Photostatic copy of Exhibit 6   | 73-74           | 108     | 109      |                      |
| 8                          | Sheet music entitled "Blacksmith Blues" published by Hill and Range Songs, Inc.   | 74              | 74      | 76       | 13                   |
| 9                          | "Happy Pay Off Day" by Mickey Katz, Capitol record No. 5576-Y   | 74              | 74      | 76       |                      |
| 10                         | "Happy Pay Day" by Sonny Burke, Decca record No. 27045  | 74              | 74      | 76       |                      |
| 11                         | "The Blacksmith Blues", by Ella Mae Morse, Capitol record No. 1693  | 74              | 74      | 76       |                      |
| 12                         | Publishing Agreement and Royalty Contract dated May 29, 1943 by and between Mildred Becker and Westmore Music Corporation | 146             | 147     | 148      | 17                   |
| 13                         | Carbon copy of Exhibit 12   | 146             | 147     | 148      |                      |
| 14                         | Letter from Stephen Janik to Mildred Becker   | 146             | 147     | 148      | 18                   |
| 15                         | Letter dated Nov. 2, 1949 from Lou Levy to Mildred Becker Schultz   | 146             | 147     | 148      | 19                   |

| Plaintiff's<br>Exhibit No. | Description  | Record Page No. |         |          | Prim<br>Exhibi |
|----------------------------|--|-----------------|---------|----------|----------------|
|                            |  | Identified      | Offered | Received |                |
| 16                         | Sheet music entitled "Happy Pay Off Day" published by Tune Towne Tunes   | 186             | 186     | 186      | 2              |
| 17                         | Certificate of Copyright Registration No. 191310, dated January 25, 1950 to Charles Douglass Hone on "Happy Pay Off Day"         | 302             | 302     | 303      |                |
| 18                         | Certificate of Copyright No. 45529, dated April 17, 1950 covering "Happy Pay Off Day"  | 302             | 302     | 303      |                |
| Defendants'                |  |                 |         |          |                |
| Exhibit No.                |  |                 |         |          |                |
| A                          | Envelope addressed to Schumann Music Publishing Company  | 128             |         |          |                |
| B                          | Document having three bars of music thereon  | 143             | 145     | 145      |                |
| C                          | Comparison chart of thematic material of "Happy Pay Off Day", "The Blacksmith Blues", "Good Old Army", and "Waitin' For My Baby" | 151             | 160     | 160      | 2              |
| D                          | Comparison chart of "Good Old Army" and prior art themes   | 159             | 160     | 160      | 3              |
| E                          | Comparison charts of prior art musical phrases used in David Raksin testimony  | 223             | 234     | 234      | 3              |
| F                          | Cover page and page one of "36 Transcendantes" by Theo Charlier  | 238             |         |          | 3              |
| G                          | Letter dated November 17, 1952 from George White to Hill and Range Songs, Inc.   | 278             | 285     | 285      |                |
| H                          | Letter dated March 12, 1953 from George White to Hill and Range Songs, Capitol Records, and Tune Towne Tunes                     | 281             | 285     | 285      |                |
| I                          | Letter dated December 4, 1952 from Capitol Records to George White   | 282             | 285     | 285      |                |
| J                          | Letter dated November 20, 1952 from George White to Capitol Records  | 283             | 285     | 285      |                |



| Defendants'<br>Exhibit No. | Description  | Record Page No. |         |          | Printed,<br>Exhibit Bo |
|----------------------------|--|-----------------|---------|----------|------------------------|
|                            |  | Identified      | Offered | Received |                        |
| K                          | Letter dated March 20, 1953 from Gang, Kopp and Tyre to George White | 284             | 285     | 285      |                        |
| L                          | Letter dated March 31, 1953 from George White to Norman Tyre         | 285             | 285     | 285      |                        |
| M                          | Letter dated April 20, 1953 from Norman Tyre to George White         | 285             | 285     | 285      |                        |
| N                          | Letter dated April 21, 1953 from George White to Gang, Kopp and Tyre | 286             | 286     | 286      |                        |
| O                          | Letter dated May 19, 1953 from George White to Gang, Kopp and Tyre   | 290             | 290     | 290      |                        |
| P                          | Letter dated May 22, 1953 from Norman Tyre to George White           | 292             | 292     | 292      |                        |
| Q                          | Letter dated May 25, 1953 from George White to Gang, Kopp and Tyre   | 293             | 293     | 293      |                        |
| R                          | Letter dated May 26, 1953 from Carl Hoefle to George White           | 295             | 295     | 295      |                        |
| S                          | Letter dated June 1, 1953 from George White to Manuel Ruiz           | 295             | 295     | 295      |                        |



No. 15973

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

MILDRED BECKER SCHULTZ,

*Appellant,*

*vs.*

JACK HOLMES, *et al.*,

*Appellees.*

---

Brief for Appellees Hill and Range Songs, Inc., Rumbalero Music, Inc., Broadcast Music, Inc., Decca Records, Inc., Loew's Incorporated, Radio Corporation of America, and Columbia Records, Inc.

---

GANG, KOPP & TYRE,

MILTON A. RUDIN,

PAYSON WOLFF,

6400 Sunset Boulevard,  
Los Angeles 28, California,

*Attorneys for Said Appellees.*

**FILED**

**JAN 28 1958**

**PAUL P. O'BRIEN, CLERK**



## TOPICAL INDEX

|   | PAGE |
|---|------|
| Jurisdiction .....  | 1    |
| Statement of the case.....  | 2    |
| I.  |      |
| Plaintiff's songs and the alleged infringing vehicles are dissimilar; there is no basis for plaintiff's contention that the music shows such similarity as will require an inference of copying ..... | 6    |
| II.   |      |
| Plaintiff's authorities that copying may be inferred are inapplicable to the circumstances herein.....  | 11   |
| III.  |      |
| Evidence of access is concededly absent; a mere "opportunity for copying" is insufficient in the case at bar.....   | 17   |
| IV.   |      |
| The findings attacked by plaintiff are supported by the record herein .....   | 20   |
| Conclusion .....  | 22   |

## TABLE OF AUTHORITIES CITED

| CASES   | PAGE   |
|---|--------|
| Arnstein v. Edward B. Marks Music Corporation, 82 F. 2d 275 .....           | 18     |
| Arnstein v. Porter, 154 F. 2d 464.....                                      | 14     |
| Baron v. Leo Feist, Inc., 78 Fed. Supp. 686.....                            | 15     |
| Blume v. Spear, 30 Fed. 629.....  | 11     |
| Carew v. RKO Radio Pictures, Inc., 43 Fed. Supp. 199.....                   | 19     |
| Cholvin v. B. & F. Music Co., Inc., 253 F. 2d 102.....                      | 16     |
| College Entrance Book Co., Inc. v. Amsco Book Co., Inc., 119 F. 2d 874..... | 14     |
| Darrell v. Joe Morris Music Co., Inc., 113 F. 2d 80.....                    | 18, 19 |
| Edwards & Deutsch Lithographing Co. v. Boorman, 15 F. 2d 35 .....           | 13     |
| Frank Shepard Co. v. Zachary P. Taylor Pub. Co., 193 Fed. 991 .....         | 12     |
| General Drafting Co. v. Andrews, 37 F. 2d 54.....                           | 12     |
| Hartfield v. Peterson, 91 F. 2d 998.....                                    | 12     |
| Lampert v. Hollis Music, Inc., 138 Fed. Supp. 505.....                      | 19     |
| List Pub. Co. v. Keller, 30 Fed. 772.....                                   | 12     |
| Newcomb v. Young, 43 Fed. Supp. 744.....                                    | 19     |
| O'Neill v. General Film Co., 152 N. Y. Supp. 599.....                       | 12, 13 |
| W. H. Anderson Co. v. Baldwin Law Pub. Co., 27 F. 2d 82....                 | 12     |
| Werner v. Encyclopaedia Britannica Co., 134 Fed. 831.....                   | 11     |
| Wilkie v. Saintly Bros., Inc., 91 F. 2d 978.....                            | 13, 14 |
| Withol v. Wells, 231 F. 2d 550.....   | 15, 16 |

## STATUTES

|   |   |
|---|---|
| United States Code, Title 28, Sec. 1291.....    | 1 |
| United States Code, Title 28, Sec. 1338(a)..... | 1 |
| United States Code, Title 28, Sec. 1338(b)..... | 1 |
| United States Code, Title 28, Sec. 2107.....    | 1 |

No. 15973

IN THE

**United States Court of Appeals**

FOR THE NINTH CIRCUIT

---

MILDRED BECKER SCHULTZ,

*Appellant,*

*vs.*

JACK HOLMES, *et al.*,

*Appellees.*

---

Brief for Appellees Hill and Range Songs, Inc., Rumbalero Music, Inc., Broadcast Music, Inc., Decca Records, Inc., Loew's Incorporated, Radio Corporation of America, and Columbia Records, Inc.

---

**Jurisdiction.**

The Amended Complaint herein [R. 3-8] charges the defendants with copyright infringement and unfair competition, and asserts jurisdiction [R. 4] under 28 U. S. C., Sec. 1338(a) and (b). The case was tried before the United States District Court for the Southern District of California, Central Division, Honorable Thurmond Clarke, District Judge, presiding, upon said Amended Complaint and the Answers of the several defendants [R. 8-53].

Upon conclusion of the trial, Judgment [R. 61-63] was entered on January 8, 1958, that plaintiff take nothing by her Amended Complaint, and awarding judgment to defendants for costs of suit incurred. Plaintiff's Notice of Appeal was filed on February 6, 1958 [R. 64], jurisdiction of the appeal asserted under 28 U. S. C., Secs. 1291 and 2107.

### Statement of the Case.

Prior to April 7, 1941, plaintiff composed the words and music to a song entitled "Good Old Army" [R. 4, 77; Pltf. Ex. 3, Ex. Bk. 4]. She had a piano arrangement made by a professional arranger [R. 79], had about 500 copies prepared [Pltf. Ex. 3, Ex. Bk. 3-6], and in 1941 took copies to several night clubs, bars, and restaurants in San Francisco in order to "plug" the song [R. 82-90].

Counsel for plaintiff, both in his opening statement [R. 67] and in the course of trial [R. 83] conceded that these submissions to bars and night clubs did not constitute direct proof of access; indeed, at no time during the course of the trial did plaintiff present evidence or testimony of a submission of her songs to the composer of the alleged infringing vehicles, or to any of the other defendants which have published, recorded or otherwise exploited said alleged infringing vehicles.

In 1949, plaintiff rewrote her song by preparing new lyrics and rewriting some of the notes of the earlier melody to fit the words in her new version, entitled "Waitin' For My Baby" [R. 93-96]. She had about 20 copies made [R. 91], and again went to a few night clubs and similar places in San Francisco [R. 95-99], as well as to a few in Los Angeles—the receptionist in the RCA Victor Building (who may have returned the music) [R. 100], an arranger, Maxine Andrews of the Andrews Sisters (who caused the music to be returned) [R. 101], and an unidentified recording or music publishing company on Santa Monica Boulevard [R. 102].

Plaintiff first heard the alleged infringing vehicle "The Blacksmith Blues" in the summer of 1952 [R. 105].



During the trial, plaintiff sang each of her selections, "Good Old Army" [R. 81-82] and "Waitin' For My Baby" [R. 92], in their entirety, as well as passages from said compositions [R. 107-108]. The Court also heard recordings played of the alleged infringing vehicles, "The Blacksmith Blues" [R. 106], "Happy Pay Day" and "Happy Pay Off Day" [R. 107].

On cross-examination, plaintiff conceded that the claimed originality of her theme lay only in the six notes contained in the first bar [R. 114], and that these notes must appear in many places in musical literature [R. 116]. She claimed that her syncopation, or rhythmic accenting of the notes was original [R. 115], but admitted that this rhythmic beat may have been contained in the "Continental," a dance with which she was familiar [R. 119], as well as used in common dance routines utilized by performers coming on-stage [R. 122-123].

The defendants presented the testimony of 2 expert witnesses in the field of music. George G. Schneider prepared a comparison chart of the thematic material contained in the compositions in question [Deft. Ex. G, Ex. Bk. 26-29]. From this, he testified that, comparing defendants' "Blacksmith Blues" with "Good Old Army," the first measure contained five out of six notes in common [R. 157]. As to the second measure, "Good Old Army" repeats the first, whereas in "Blacksmith Blues" there is a "decided variation" [R. 157]. In bar 3, the only notes the same appeared on octave apart in the selections; bar 4 had one note in common, and bars 5, 6, 7, and 8 had none in common [R. 157-158]. Taking into consideration tempo or time values, there would be even less similarity in the selections than the chart indicates [R. 189].

Mr. Schneider testified that an old trumpet exercise by Theodore Charlier, which had been played in the courtroom, followed the melodic line of the first four bars of "Blacksmith Blues" note for note [R. 158], but that neither of plaintiff's songs followed the same sequence of notes. Referring to the same trumpet exercise, the other expert witness stated that he was "flabbergasted" to see that the exercise and "Blacksmith Blues" were almost the same tune, whereas this comparison with "Good Old Army" does not exist [R. 238-242].

Mr. Schneider also identified and played numerous public domain musical themes on the piano [R. 162-163, 167], showing that the sequence of notes in the first measure of plaintiff's songs is not new [R. 168], and that the bouncing rhythmic effect which plaintiff described as syncopation has been in musical literature for hundreds of years [R. 162].

On cross-examination, counsel for defendant attempted to extract a concession from the witness that the selections of public domain music were different from plaintiff's music in that the rhythmic timing of plaintiff's music was obtained by the use of a dotted eighth note paired with a sixteenth note, whereas other note combinations appeared in the source materials. However, Mr. Schneider testified [R. 176]:

"\* \* \* The way it is usually played, you couldn't tell whether it was an eighth note or a dotted eighth, whether it was a sixteenth rest or a dotted sixteenth rest."

The other musical expert, Mr. David Raksin, also testified that the sound of the music contained in the public domain materials is the same when played, and

that the difference in the form of the notation exists only on paper, but not in its performance [R. 231-232].

Analyzing just the first measures of "Good Old Army" and "Blacksmith Blues," respectively, David Raksin pointed out the significant differences in the two selections [R. 206-210]:

"Blacksmith Blues" contains the note A-natural which "Good Old Army" does not.

"Blacksmith Blues" has a note at the end of its first measure which carries the rhythmic impulse over into the next bar, a "carry-in," whereas "Good Old Army" does not have such a note at all.

He proceeded to play each subsequent measure of the two selections, explaining the differences between the notes, rhythm, melodic line, "intent," and structure of the plaintiff's song and the alleged infringing vehicle [R. 206-220].

Mr. Raksin also testified as to a number of public domain sources culled from standard reference works [R. 224], which utilized the same thematic material as plaintiff's composition [R. 226-232]. Some of these items not only conformed notewise to plaintiff's first bar, but rhythmically as well: "When the Saints Go Marching In" [R. 229-230], a passage from a Mozart symphony [R. 230-231], and a theme from Glück [R. 261].

In summary, the trial court heard, in their entirety, plaintiff's and defendants' music sung, played on records and on the piano. It heard the music played and compared measure by measure, and it heard numerous examples of public domain sources played and compared, both melodically and rhythmically, with plaintiff's composition.

On the basis of the foregoing the Court found that there are some notes appearing in common in the first measure of each of the respective compositions, but that this common utilization of notes occurs frequently in popular music [Finding of Fact 12; R. 58; see also R. 116, 219-220]; that there are differences in even the first measures of the respective compositions, conveying to the listener a substantially different musical sound, feeling and impression [Findings of Fact 13 and 14; R. 58-59]; and that the listener hearing performances of the selections as a whole does not receive an impression of similarity or resemblance [Finding of Fact 16; R. 59].

## I.

### **Plaintiff's Songs and the Alleged Infringing Vehicles Are Dissimilar; There Is No Basis for Plaintiff's Contention That the Music Shows Such Similarity as Will Require an Inference of Copying.**

Plaintiff's basic contention is that the music showed such striking similarity as to overcome the conceded absence of any evidence of access to plaintiff's songs and to require, as a matter of law, a judgment in plaintiff's favor.

This contention is without foundation, and falls particularly at the point of its basic premise, that is, that there is a striking similarity in the plaintiff's and defendants' music.

During the course of trial, the Court heard renditions of all the selections in question, from which it concluded that the impression conveyed was not one of similarity, let alone the degree of striking similarity which might raise an inference of copying.

Comparative music charts, such as Defendants' Exhibits C [Ex. Bk. 26-29] and E [Ex. Bk. 36-37], were intro-

duced into evidence showing visually that only a random smattering of notes in the alleged infringing vehicles coincide with notes in plaintiff's songs.

Expert witness Raksin played and compared the selections measure by measure, and further demonstrated to the Court the wide discrepancies in the music. For example, measures 2 of the respective compositions show "significant differences" in rhythm, a descending musical line in "Blacksmith Blues" versus an ascending line in "Good Old Army," and the use of A-natural in "Blacksmith Blues" which does not appear in "Good Old Army" [R. 210-211]. The third measures of the two melodies had differences "so audible that it doesn't take a musician to hear them" [R. 211], and, we submit, it doesn't take a musician to see the differences in the written notes either. See also R. 212-213, in which other measures of the music were played on the piano, compared and shown to be "very clearly not the same," and to contain "no similarity that any reasonable musician could perceive."

Plaintiff's entire position is based upon the fact that the first four notes of the first measure of her compositions coincide with the first four notes of "The Blacksmith Blues," which notes are repeated in the repetition of the same musical phrase commencing in the 9th measure of the songs.

As to these four notes, both expert witnesses testified that they comprise a common musical phrase, frequently found in musical literature. Examples of the use thereof, both as to notes and rhythmic structure, were placed before the Court.

It should also be pointed out that the earlier version of "The Blacksmith Blues," entitled "Happy Pay Off

Day” [Appellant’s Op. Br. p. 5; Pltf. Ex. 8, Ex. Bk. 14], does not even contain this 4-note similarity, in the first measure or at any other point in the melodic line thereof.

Plaintiff’s contention with respect to the four-note similarity is such as to magnify its significance far out of all proportion and reason. The first four specifications of similarity (Appellant’s Op. Br. pp. 33-34) assertedly comprising a total of 26 of the claimed 39 “factors in common,” are that four notes in the first measure of “Blacksmith Blues” are similar to notes appearing in the first measure of plaintiff’s songs; that four notes in the third measure of “Blacksmith Blues” are similar to notes appearing in the first measure of plaintiff’s songs; that four notes in the fifth measure of “Blacksmith Blues” are similar to notes appearing in the first measure of plaintiff’s songs, etc.

Plaintiff’s contention that this similarity appears in bars 5, 7, and 15 of “Blacksmith Blues” is erroneous since the notes appearing therein are B-flat and D, whereas the so-called *do* and *mi* notes appearing in plaintiff’s compositions to which similarity is claimed are E-flat and G [see also, R. 244-248, in which the witness Raksin explained that the materials in bars 5, 7, 13 and 15 of “Blacksmith Blues” were modulated themes, and that these do not give the same tonal impression to the ear and mind]. This reduces the number of so-called “factors in common” to 13 instead of the claimed 26.

More important, however, is the fact that the claimed similarities do not appear in the same places in the respective selections. Only in bars one and nine (the commencement and repetition of the melodic phrases of the two selections) do the 4-note phrases correspond. Otherwise, plaintiff’s comparisons are taken wholly out of con-

text, likening a note in bar 11 of "Blacksmith Blues," for example, to a note in an entirely different portion of the plaintiff's selection.

This fatal weakness of plaintiff's argument is dramatically illustrated by specifications of claimed similarity *Sixth*, *Eighth*, and *Tenth* (Appellant's Op. Br. pp. 34-35). Item *Sixth* refers to the use of a slur (a type of musical "punctuation"—not a musical sound), in Bar 13 of "Blacksmith Blues," likened to a slur in Bar 9 of plaintiff's composition.

Item *Eighth* claims that, at the end of Bar 5 of "Blacksmith Blues" a dotted-eighth note is utilized for the note *sol*. In the first place, the note *sol* would be B-flat, and the note appearing at the end of Bar 5 of "Blacksmith Blues" is F, or *re*. In the second place, the final notes of Bars 1 and 2 of "Good Old Army" are not dotted eighth notes. However, even assuming that these two errors on one item of claimed similarity did not exist, it would be of no significance whatever that the fifth measure of one composition contained one note in common with the first and/or second measure of the other composition. A listener hears the music and derives meaning therefrom in context of the melodic line, just as a reader derives meaning from spoken or written language as used in its context. The fact that the fourth word of the lyrics of "The Blacksmith Blues" is "Kentucky" does not render those lyrics similar to those of Stephen Foster's familiar "My Old Kentucky Home," in which the word "Kentucky" appears as the eighth word. ("The sun shines bright on my old Kentucky home . . .")

Item *Tenth* claims that the fifth bar of "The Blacksmith Blues" utilizes the same rhythmic pattern as an entirely different bar or bars of plaintiff's compositions. Plain-

tiff completely rises above the fact that, not only are different measures of the respective songs involved, but also the measures which are cited contain *no common notes or musical sounds* whatever. In other words, a rhythmic pattern in plaintiff's work appears in an entirely different portion of defendants', but even there the notes or musical sounds are completely different as well.

Regarding item *Fifth*, concerning so-called "passing notes," plaintiff argues a further similarity, although even plaintiff recognizes the fact that the notes themselves are different. Contrary to plaintiff's contention, Mr. Raksin, in commenting upon the passing notes, attributed considerable importance to this difference, explaining that it showed a different "intent" and gave a different rhythmic impulse to the music [R. 209].

Accordingly, from the music itself, as well as from the analysis thereof given by the expert witnesses, it is apparent that the "factors in common" are random in nature and certainly not of a type or scope as would, as a matter of law, raise an inference that copying had taken place.

Moreover, plaintiff completely ignores the fact that note for note and measure for measure, with the exception of the four-note portion of the theme appearing in common in Bars 1 and 9, the songs are entirely different in melody, rhythm, and structure [see, *e.g.*, R. 218, 219].

Accordingly, by a comparison of the written music and of the music as performed, and on the basis of expert testimony explaining the significance thereof—ample evidence by any standard—the Court concluded that the compositions were not similar and that there was no infringement. Clearly this result is justified by the evidence, and



plaintiff's contention, that the evidence compels a finding of infringement as a matter of law, is without any basis whatever.

## II.

### **Plaintiff's Authorities That Copying May Be Inferred Are Inapplicable to the Circumstances Herein.**

Numerous authorities have been cited by plaintiff (Appellant's Op. Br. pp. 27-33) in support of the proposition that, in a proper case, the similarities displayed in the works of plaintiff and defendant will in themselves constitute proof that copying occurred. These authorities are inapplicable to the circumstances herein, and a comparison of the factual backgrounds in the cited cases only tends to emphasize the basic weakness of plaintiff's argument in the within action.

In *Blume v. Spear*, 30 Fed. 629 (S. D. N. Y. 1887), the entire melodic lines of the two compositions followed one another, measure for measure. Here, only two measures, the first and ninth (which is a repetition of the first in each song) display similarities. Here, "when played by a competent musician," the songs do not appear to be the same, but thoroughly different.

*Werner v. Encyclopaedia Britannica Co.*, 134 Fed. 831 (3d Cir., 1905), involved the copying of numerous articles appearing in the Encyclopaedia Britannica, to the extent that a preliminary injunction was granted. Defendants, apparently conceding similarity, contended that their articles were derived from independent sources of information; the Court stated that no evidence of such independent sources appeared in the record.

In the within action, not only was similarity not conceded, but the record discloses ample evidence of gross

dissimilarities and public domain sources available to defendants for the four-note figure appearing at the beginning of their songs. Moreover, the Charlier trumpet exercise [Deft. Ex. F, Ex. Bk. 38-39], copyrighted in 1926, follows the melodic line of defendants' music so precisely that the witness Raksin stated he was "flabbergasted" by their similarity, and the witness Schneider stated that said melodies were identical for the first four bars.

Similarly, each of the following cases cited, *List Pub. Co. v. Keller*, 30 Fed. 772 (S. D. N. Y., 1887); *Frank Shepard Co. v. Zachary P. Taylor Pub. Co.*, 193 Fed. 991 (2d Cir., 1912); *W. H. Anderson Co. v. Baldwin Law Pub. Co.*, 27 F. 2d 82 (6th Cir., 1928); *General Drafting Co. v. Andrews*, 37 F. 2d 54 (2d Cir., 1930); *Hartfield v. Peterson*, 91 F. 2d 998 (2d Cir., 1937), involved literary materials in which numerous common mistakes or misprints appeared in the alleged infringing and infringed upon works, which common mistakes could only be explained in terms of copying.

There are no such circumstances present here. The coincidence of musical notes in minor, and based upon a musical figure (the do-mi-sol triad) which plaintiff concedes (Appellant's Op. Br. p. 23) dates back at least 150 years. Moreover, the differences appearing in all measures of the compositions except 1 and 9 cannot but overwhelmingly refute any contention that copying is the only conceivable explanation for the minor similarities which do appear.

*O'Neill v. General Film Co.*, 152 N. Y. Supp. 599 (1915), involved an infringement of a dramatization of the novel "Count of Monte Cristo" by a motion picture version of the same novel. No explanation was afforded

by defendant therein for the fact that its motion picture omitted from the book over 50 of the identical characters as the plaintiff's play omitted; that scenes depicted in the motion picture were the same as those appearing in the play; and that dialogue, not appearing in the Dumas novel but spoken by the play characters, was also spoken by the characters in the screen play.

Moreover, contrary to the facts herein, there was no question of access to plaintiff's work in the *O'Neill* case; the play was a famous one which had been performed on the stage over 5,000 times.

In *Edwards & Deutsch Lithographing Co. v. Boorman*, 15 F. 2d 35 (7th Cir., 1926), which involved copyrighted interest and discount charts, there was identity in the plan, format and arrangement of the materials, which constituted the copyrightable feature of plaintiff's work. Moreover, there was no question of access involved, since defendant had been a distributor of plaintiff's work for several years prior to putting out his own work. Here, there is no identity in the works involved, and the failure of proof of access is conceded.

In *Wilkie v. Saintly Bros., Inc.*, 91 F. 2d 978 (2d Cir., 1937), findings and judgment in favor of plaintiff were rendered by the trial court, and affirmed upon appeal, on the basis of the testimony of expert witnesses who testified to the various indicia of copying in music, and who further testified that, in their judgment, the similarities in the selections could not be explained by coincidence. Precisely the reverse is the case here. Moreover, the Court, 91 F. 2d at 980, summarized the similarities in the plaintiff's and defendants' songs as including the identity of the lengthy eight-measure melodic phrase (as contrasted to a four *note* identity in the within action);

the identical use of three-bar “departure” or ending (which has no parallel in the within action); the identical use of final chords terminating each eight bar sequence (plaintiff’s claim herein is limited to melodic line only, there never having been made any contention regarding chords or harmony); and the use of an identical change in the direction of the melodies of the two compositions (the melodies in the defendants’ music herein change in a different manner than does plaintiff’s as shown by witness Raksin’s measure-by-measure comparison showing the songs to be entirely different after the first measure of each, R. 206-219).

The Court in the *Wilkie* case summed up its comparison of the two works as showing “the virtual identity of thirty-two bars,” which was virtually admitted by defendant’s witnesses. Precisely the converse is true here.

In *College Entrance Book Co., Inc. v. Amsco Book Co., Inc.*, 119 F. 2d 874 (2d Cir., 1941), there was a 96% identity of one word-list and an 82% identity of the other word-list included in two sets of booklets designed as study aids for students of French in the New York High Schools. Numerous other inexplicable similarities were present, such as common errors and peculiarities in the presentation of materials. Moreover, defendant admitted he owned copies of plaintiff’s books and used them “to some extent” in compiling his own.

*Arnstein v. Porter*, 154 F. 2d 464 (2d Cir., 1946), involved primarily the propriety of summary judgment proceedings in copyright infringement cases. The court stated that there were similarities in the music, but that “unquestionably, standing alone, they do not compel the conclusion, or permit the inference, that defendant copied.” (154 F. 2d at 469.) Similarly, the coincidental use of

a few notes in "Good Old Army" and "Blacksmith Blues" is entirely insufficient evidence to compel the court to the conclusion that the latter must necessarily have been copied from the former.

*Baron v. Leo Feist, Inc.*, 78 Fed. Supp. 686 (S. D. N. Y., 1948), involved a situation in which defendants had ample access to plaintiff's song, a Calypso tune well known for many years. More importantly, the Court characterized the infringing vehicle as "little short of identical" to plaintiff's music, from the standpoint of rhythm, construction and harmony, and mentioned the existence of an "uninterrupted sequence of identical notes" of "too great length to admit of any other inference but copying." (78 Fed. Supp. at 686.)

In contrast, in the within action, there are major discrepancies in rhythm [see, *e.g.*, R. 209, 210, 211, 214, 215-216, 218, in which the witness Raksin commented upon rhythmic differences]; construction [see R. 218-219, in which structural differences were explained]; and no claim whatever has been or could be made by plaintiff as to harmony since the copyrighted versions of plaintiff's songs [Pltf. Ex. 2, Ex. Bk. 1; Pltf. Ex. 5, Ex. Bk. 7] show melodic line only. Similarly, as hereinabove discussed (*supra*, Part I), there is no point of similarity extending more than for four notes duration, that similarity appears but twice, and otherwise the selections are highly dissimilar.

*Withol v. Wells*, 231 F. 2d 550 (1956), involved an infringement of both the lyrics and music of an ecclesiastical composition entitled "My God and I." At least 600,000 printed copies of plaintiff's work were in circulation, and the work had been performed in some three hundred churches in Chicago. Defendant, who was an

ordained minister of an interdenominational group, knew the plaintiff's work to the extent that the Court was able to find as a fact that he had committed it to memory. The defendant's work had the same title, substantially similar lyrics (*e.g.*, Plaintiff's: "My God and I, will go for aye together"; Defendant's: "My God and I will walk for aye together," 231 F. 2d at 552), and the melodies were "almost identical." Taking the soprano, alto and bass parts separately, the plaintiff contended and defendant apparently did not dispute that the infringing vehicle contained an 80.95% identity to plaintiff's soprano part, taken note for note; 69.84% identity in the alto; and 59.96% identity in the bass.

Clearly the situation in the *Withol* case is a far cry from that involved here, in which only a minor similarity occurs, and in which a note for note comparison (which is the only way the melodic lines of the compositions can be compared in context) emphasizes the overwhelming differences in melody and structure, rather than similarities. Moreover, obviously no claim is or could be made herein as to lyrics.

In *Cholvin v. B. & F. Music Co., Inc.*, 253 F. 2d 102 (7th Cir., 1958), both plaintiff's and defendant's experts testified that the two works were exactly alike to an extent of approximately 50%; plaintiff's expert further stated it would be impossible for two compositions to be so much alike without copying.

In contrast, here the experts demonstrated that the similarities were insignificant, and the Court, with the music, comparative charts, and this testimony, plus having heard renditions of the music in question, was clearly entitled to find, as it did, that the respective compositions were dissimilar.

III.

**Evidence of Access Is Concededly Absent; a Mere  
“Opportunity for Copying” Is Insufficient in the  
Case at Bar.**

Plaintiff conceded during the trial [R. 67, 83], and again in Appellant's Opening Brief, at pages 13, 20, 22, that there was no direct evidence that defendants had ever seen or heard plaintiff's music. Moreover, plaintiff conceded that the do-mi-sol triad upon which the first measures of the respective compositions are based is a common musical device (Appellant's Op. Br. p. 23), which has apparently sprung into the minds of Bach, Mozart, Stephen Foster and numerous other composers [R. 167, 226-232]. Ignoring for the sake of argument the substantial differences existing in the first measures of the respective works, as pointed out in the Statement of the Case, *supra*, it is more reasonable to assume that the same inspiration came independently to the composer of "Blacksmith Blues" than to assume that this common theme in said song was copied from an unpublished work.

Conversely, if as plaintiff contends the do-mi-sol triad theme was copied from someone, plaintiff has introduced no evidence whatever to support the contention that it was copied from "Good Old Army" or "Waitin' For My Baby," rather than from the numerous public domain sources in evidence.

Specifically we call the Court's attention to Defendants' Exhibit F, the Charlier trumpet exercise [Ex. Bk. 38-39]. When expert witness Raksin was shown this music, he stated that the similarity of melodic line for 15 measures was so great that he was "flabbergasted" [R. 238-242]. Mr. Schneider also testified to the substantial similarity between "Blacksmith Blues" and the Charlier exercise

[R. 158]. When the exercise was played on the piano, “jazzed up” or syncopated, even the plaintiff conceded that it sounded like “Blacksmith Blues” [R. 145].

It should be pointed out that the trumpet exercise is built upon the same do-mi-sol triad, and in addition, contains the natural note passing tone as in “Blacksmith Blues” rather than the flatted note as in “Good Old Army.” Said exercise also has a one-bar statement and second-bar reply, as in “Blacksmith Blues,” rather than a repetition of the first bar, as in “Good Old Army” [R. 240-242].

Plaintiff has offered no explanation for this striking similarity, nor any rebuttal against the evidence that, if “Blacksmith Blues” was inspired by another piece of music rather than independently conceived, it was inspired by said Charlier trumpet exercise, or by one of the many other public domain sources in evidence, and not by “Good Old Army.”

It is, of course, well settled that even in cases of substantial similarity, which does not exist here, there is no liability if there has been independent production.

*Arnstein v. Edward B. Marks Music Corporation*,  
82 F. 2d 275 (2d Cir., 1936);

*Darrell v. Joe Morris Music Co., Inc.*, 113 F. 2d  
80 (2d Cir., 1940):

“We have already said in *Arnstein v. Marks Music Corporation*, 2 Cir., 82 F. 2d 275, that such simple trite themes as these are likely to recur spontaneously; indeed the defendants have been able to discover



substantial equivalents of that at bar in a number of pieces which appeared earlier than the plaintiff's, and while this did not impair the copyright, it serves to fortify the judge's conclusion that the similarity did not falsify Silver's denial. It must be remembered that, while there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing; and much fewer still suit the infantile demands of the popular ear. Recurrence is not therefore an inevitable badge of plagiarism."

Moreover, the mere distribution of copies of the music to persons having no connection or relationship with defendants is in no way probative that access actually existed.

*Lampert v. Hollis Music, Inc.*, 138 Fed. Supp. 505 (E. D. N. Y., 1956);

*Darrell v. Joe Morris Music Co., Inc.*, 113 F. 2d 80 (2d Cir., 1940);

*Carew v. RKO Radio Pictures, Inc.*, 43 Fed. Supp. 199 (S. D. Calif., 1942);

*Newcomb v. Young*, 43 Fed. Supp. 744 (S. D. N. Y., 1942).

In each of the above-cited cases, even though the respective plaintiffs had distributed copies of their respective works to prospective publishers, or other exploiters of said works, that fact alone was considered to be insufficient in view of the total absence of proof that an actual submission had been made to the defendants.

IV.

**The Findings Attacked by Plaintiff Are Supported by the Record Herein.**

Plaintiff herein has attacked numerous of the Findings of Fact of the Court below as erroneous. Each of the specifications of error is without foundation.

Regarding Finding 5, the Complaint was dismissed at the outset of the trial as to Jack Holmes, also known as Charles Douglas Hone, without any objection from counsel for plaintiff [R. 69]. Plaintiff's counsel accepted that they were one and the same man, and stated to the Court that he is dead.

The Court had before it Plaintiff's Exhibits 17 and 18, being Certificates of Copyright issued to the deceased and covering "Happy Pay Off Day," the earlier version of the alleged infringing vehicles; it had the sheet music and phonograph records [Pltf. Exs. 8, 9, 10 and 11] showing Holmes as composer of words and music to each of the alleged infringing compositions [see, *e.g.*, Pltf. Ex. 8, Ex. Bk. 13-14].

Moreover, in his opening statement [R. 66], counsel for plaintiff made the following statement:

"In 1950, a man by the name of Jack Holmes, also known as Hone, wrote two pieces of music, using what we say is the same theme, the same musical theme. One of the songs is 'Happy Pay Day' or 'Happy Pay Off Day' and the other one is 'The Blacksmith Blues.' "

Concerning the other defendants, as found in Finding 6, the Amended Complaint herein itself alleges that they

placed the alleged infringing music on the market, which allegations, insofar as the marketing of “Happy Pay Off Day” and “Blacksmith Blues” is concerned, were admitted by the various defendants [R. 10, Par. VI; R. 13, Par. III; R. 21, Par. II; R. 26, Par. II; R. 32, Par. II; R. 37, Par. II; R. 43, Par. II; R. 49, Par. II]. These verified Answers contained general allegations to the effect that said uses of “Happy Pay Off Day” and “Blacksmith Blues” were pursuant to licenses. Since the issue of liability was the only one tried, no further evidence on the questions of licenses and indemnities was deemed necessary.

Concededly, there is no evidence that any defendants obtained a license from plaintiff, but the relevance thereof would only appear if the “Happy Pay Off Day” and “Blacksmith Blues” had been found to be infringements.

All other assignments of error are based upon plaintiff’s basic contention that the similarities in the music were such as to compel a holding of infringement, as a matter of law. Since this basic premise is erroneous, as demonstrated in Parts I and II of this Brief, *supra*, we will not burden the Court with a detailed and repetitious rebuttal of each of the points raised.

Suffice it to reiterate that the differences were great and the similarities in the music were minimal, and these based upon materials abundantly found in prior musical literature. In view of this fact, it is clear that the Court was entitled to find, upon the evidence, that there was neither proof of access nor was there copying.

**Conclusion.**

The judgment of the District Court should be affirmed.

Respectfully submitted,

GANG, KOPP & TYRE,

MILTON A. RUDIN,

PAYSON WOLFF,

*Attorneys for Appellees, Hill and Range  
Songs, Inc., Rumbalero Music, Inc.,  
BMI Broadcast Music, Inc., Columbia  
Records, Inc., Decca Records, Inc.,  
Radio Corporation of America and  
Loew's Incorporated.*

No. 15973

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

MILDRED BECKER SCHULTZ,

*Appellant,*

*vs.*

CARL HOEFLE and DELMAR S. PORTER, individually and as copartners dba TUNE TOWNE TUNES; CAPITOL RECORD, INC.; CAPITOL RECORDS DISTRIBUTING CORP.; HILL AND RANGE SONGS, INC.; RUMBALERO MUSIC, INC.; BROADCAST MUSIC, INC.; DECCA RECORDS, INC.; LOEW'S INCORPORATED; RADIO CORPORATION OF AMERICA; and COLUMBIA RECORDS, INC.,

*Appellees.*

---

Appellees' Brief, for Carl Hoefle and Delmar S. Porter, Individually and as Copartners d.b.a. Tune Towne Tunes; Capitol Records, Inc.; Capitol Records Distributing Corp.

---

MANUEL RUIZ, JR.,  
704 South Spring Street,  
Los Angeles 14, California,  
*Attorney for Appellees.*

FILED

JAN 28 1959

PAUL P. O'BRIEN; CL



No. 15973  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

MILDRED BECKER SCHULTZ,

*Appellant,*

*vs.*

CARL HOEFLE and DELMAR S. PORTER, individually and as copartners dba TUNE TOWNE TUNES; CAPITOL RECORD, INC.; CAPITOL RECORDS DISTRIBUTING CORP.; HILL AND RANGE SONGS, INC.; RUMBALERO MUSIC, INC.; BROADCAST MUSIC, INC.; DECCA RECORDS, INC.; LOEW'S INCORPORATED; RADIO CORPORATION OF AMERICA; and COLUMBIA RECORDS, INC.,

*Appellees.*

---

Appellees' Brief, for Carl Hoefle and Delmar S. Porter, Individually and as Copartners d.b.a. Tune Towne Tunes; Capitol Records, Inc.; Capitol Records Distributing Corp.

---

**Adoption and Incorporation by Reference of Co-Appellees Answering Brief.**

The appellees Capitol Records, Inc., a Corporation, Capitol Records Distributing Corp., a Corporation, Carl Hoefle and Delmar S. Porter, Individually, and as Copartners dba under the fictitious firm name and style of Tune Towne Tunes, have joined in the brief filed on behalf of appellees Hill and Range Songs, Inc., Rumbalero

Music Inc., Broadcast Music Inc., Decca Records, Inc., Loew's Incorporated, Radio Corporation of America, and Columbia Records.

By joining in said brief as though filed by said appellees, reference is hereby made to the same, in every and all particulars, and repeated hereafter as though set forth in its entirety.

### I.

Counsel for appellees plays a musical instrument. The reporter's transcript indicates that in the interrogation of witnesses he played the violin, to illustrate the interrogations put to the witnesses. [R. 162.]

Thus, in the interrogation of the witness George G. Schneider, a qualified expert, the following is noted:

"Q. (Mr. Ruiz plays violin): Now, with respect to the research that you have done and predicated upon your experience as a musicologist, can you give us your studied opinion as to whether that effect, that bouncing effect which she described as syncopation, is original, or is it something that has been in the musical field for some time? A. It has been in the musical field for hundreds of years."

The Court below *listened* to the musical compositions at issue and then rendered its judgment in favor of appellees. The quality of syncopation, rhythmic accenting, tempo, time values and differences in form notation and impulse, as well as sequence of notes, must of necessity *be heard*, inasmuch as auditory impression is involved.

To write a cumulative brief upon the law applicable and to further geometrically pave musical structure will add little to the excellent brief submitted by co-appellees and will not serve to make any auditory perception. Appellees



therefore respectfully suggest that if perchance an appellate court justice in the case at bar not be endowed with the perceptive talents of a professional arranger or composer who may experience an auditory reaction by reading evidence in written form, that the recordings played below, and which appear upon the tape recorder of the court reporter, be ordered to augment the record and be replayed, and request is hereby made that the auditory record, complement the reporter's transcript at the time of oral agreement.

Appellees will submit the question of similarity or dissimilarity upon the tonal impressions which the Justices might receive upon said play-back, in the event by the reading of the brief heretofore incorporated by reference, and joined in by these responding appellees, there may remain some doubt on any material matter.

Respectfully subnitted,

MANUEL RUIZ, JR.,

*Attorney for Appellees.*



No. 15,973

In the

# United States Court of Appeals

*For the Ninth Circuit*

---

MILDRED BECKER SCHULTZ,

*Appellant,*

vs.

CARL HOFLE and DELMAR S. PORTER, individually and as copartners d.b.a. TUNE TOWNE TUNES; CAPITAL RECORDS, INC.; CAPITAL RECORDS DISTRIBUTING CORP.; HILL AND RANGE SONGS, INC.; RUMBA- LERO MUSIC, INC.; BROADCAST MUSIC, INC.; DECCA RECORDS, INC.; LOEW'S, INCORPORATED; RADIO CORPORATION OF AMERICA; and COLUMBIA RECORDS, INC.,

*Appellees.*

---

## Appellant's Reply Brief

---

CARL HOPPE  
JAMES F. MITCHELL  
2610 Russ Building  
San Francisco 4, California

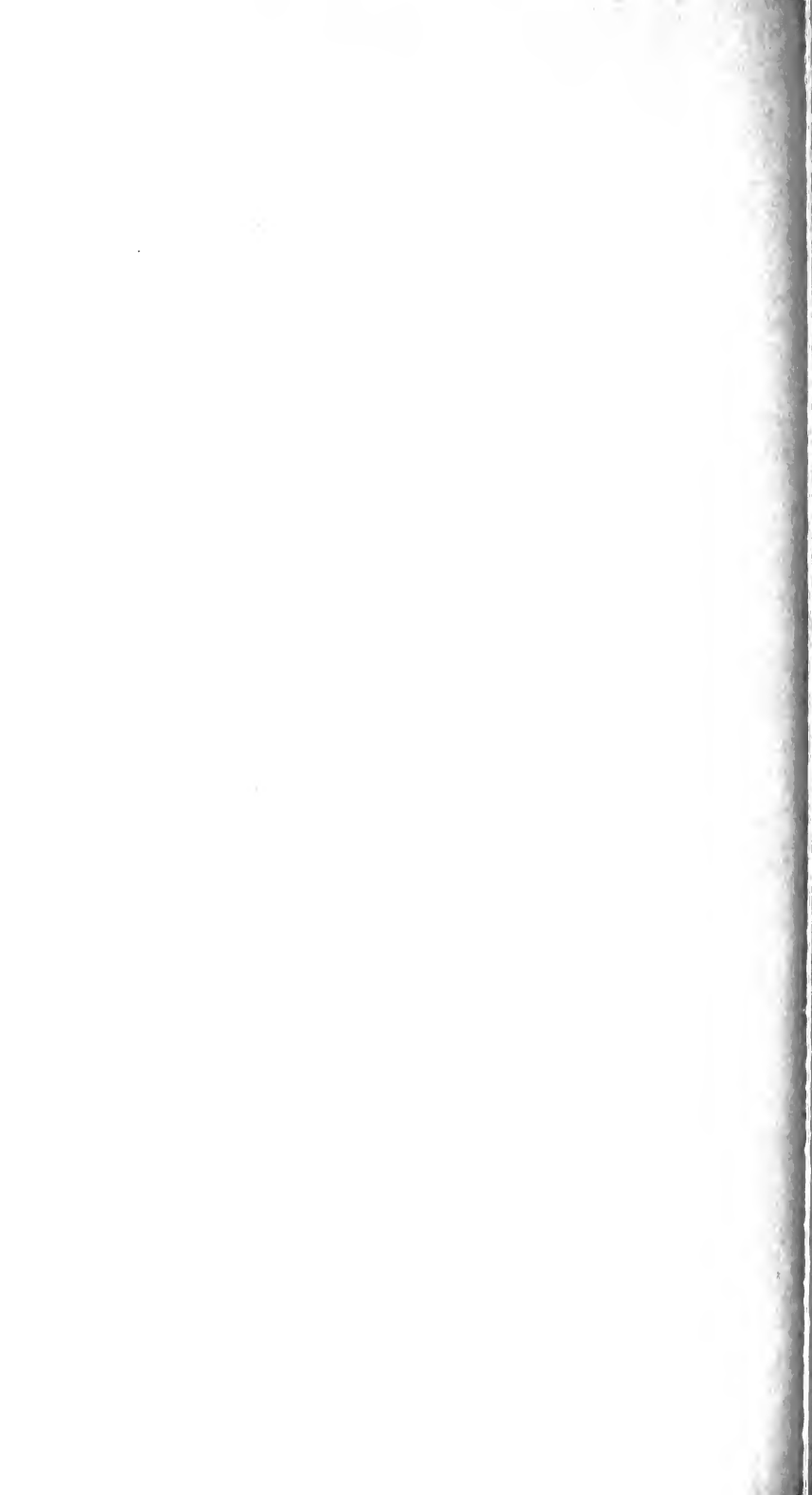
THOMAS P. MAHONEY  
4055 Wilshire Boulevard  
Los Angeles 5, California

*Attorneys for Appellant*

FILED

FEB 27 1959

PAUL P. GIBBON, CLERK



## SUBJECT INDEX

|   | Page |
|---|------|
| Defendants' reliance on Charlier is no defense to plaintiff's claim .....                         | 2    |
| Defendants' reliance on the Saints is no defense to plaintiff's claim .....                       | 8    |
| Defendants' reliance on Mozart is no defense to plaintiff's claim                                 | 11   |
| Defendants' reliance on Gluck is no defense to plaintiff's claim                                  | 12   |
| Defendants' reliance on Bach is no defense to plaintiff's claim..                                 | 13   |
| Defendants' reliance on Stephen Foster is no defense to plaintiff's claim .....                   | 14   |
| Defendants' reliance on other prior art is no defense to plaintiff's claim .....                  | 15   |
| Defendants' reliance on the District Court's findings with respect to prior art is misplaced..... | 17   |
| Defendants' argument on dissimilarity evades the question.....                                    | 18   |
| Defendants have not distinguished plaintiff's authorities.....                                    | 22   |
| Defendants overstate admissions as to access.....   | 22   |
| Defendants' authorities are distinguished.....  | 23   |
| Defendants have not overcome plaintiff's attack upon the questioned findings .....                | 26   |
| Conclusion .....  | 27   |
| Appendix  |      |

# TABLE OF AUTHORITIES CITED

| CASES  | Pages      |
|--|------------|
| Arnstein v. Edward B. Marks Music Corporation (2nd Cir. 1936), 82 F.2d 275.....              | 23, 24, 25 |
| Belford v. Scribner (1892), 144 U.S. 488 12 S. Ct. 734.....                                  | 7          |
| Benny v. Loew's Incorporated (9th Cir. 1956), 239 F.2d 532, affirmed (1958) 356 U.S. 43..... | 21         |
| Boosey v. Empire Music Co. (S.D. N.Y. 1915), 224 Fed. 646..                                  | 20         |
| Boucicault v. Fox (S.D. N.Y. 1862), Fed. Cas. 1691, 3 F. Cas. 977 .....                      | 9          |
| Callaghan v. Myers (1888), 128 U.S. 617, 9 S. Ct. 177.....                                   | 6, 12      |
| Carew v. R.K.O. Pictures, Inc. (S.D. Cal. 1942), 43 F. Supp. 199 .....                       | 25         |
| Darrell v. Joe Morris Music Co. (2nd Cir. 1940), 113 F.2d 80..                               | 24, 25     |
| Encyclopaedia Britannica Co. v. American Newspaper Ass'n (D. N.J. 1904), 130 Fed. 460.....   | 10         |
| Fred Fisher, Inc. v. Dillingham (S.D. N.Y. 1924), 298 Fed. 145 .....                         | 12         |
| Graver Mfg. Co. v. Linde Co. (1950), 339 U.S. 605, 70 S. Ct. 854 .....                       | 21         |
| Interstate Circuit v. U. S. (1939), 306 U.S. 208, 59 S. Ct. 467                              | 9          |
| Lampert v. Hollis Music (E.D. N.Y. 1956), 138 F. Supp. 505..                                 | 24, 25     |
| Leon v. Pacific Telephone & Telegraph Co. (9th Cir. 1937), 91 F.2d 484.....                  | 19, 21     |
| Mawman v. Tegg (1826), 2 Russ. 385, 38 Eng. Rep. 380.....                                    | 5          |
| Miller v. Life Insurance Company (1870), 12 Wall. (79 U.S.) 285 .....                        | 18         |
| Newcomb v. Young (S.D. N.Y. 1942), 43 F. Supp. 744.....                                      | 25         |
| Reynolds v. Whitin Mach. Works (4th Cir. 1948), 167 F.2d 78                                  | 17         |

|   | Pages |
|---|-------|
| Vegetable Oil Products Co. v. Dorward & Sons Co. (N.D. Cal. S.D. 1943), 53 F. Supp. 281.....              | 17    |
| Weatherby & Sons v. International Horse Agency and Exchange, Ltd. (1910), 2 Ch. 297, 79 L.J. Ch. 609..... | 20    |
| Westinghouse Co. v. Wagner Mfg. Co. (1912), 225 U.S. 604 32 S. Ct. 691.....                               | 8     |
| Wilhartz v. Turco Products (7th Cir. 1947), 164 F.2d 731.....   | 18    |
| Wilkie v. Santly Bros. (2nd Cir. 1937), 91 F.2d 978.....  | 24    |





In the  
**United States Court of Appeals**  
*For the Ninth Circuit*

---

---

MILDRED BECKER SCHULTZ,

*Appellant,*

vs.

CARL HOEFLE and DELMAR S. PORTER, individually and as copartners d.b.a. TUNE TOWNE TUNES; CAPITAL RECORDS, INC.; CAPITAL RECORDS DISTRIBUTING CORP.; HILL AND RANGE SONGS, INC.; RUMBA- LERO MUSIC, INC.; BROADCAST MUSIC, INC.; DECCA RECORDS, INC.; LOEW'S, INCORPORATED; RADIO CORPORATION OF AMERICA; and COLUMBIA RECORDS, INC.,

*Appellees.*

---

**Appellant's Reply Brief**

---

Appellant files this reply in response (1) to Brief for Appellees Hill and Range Songs, Inc., et al. and (2) to Appellees' Brief for Carl Hoefle, et al. For purposes of convenience, references to the former brief will be (Hill Br., page . . .) and references to the latter brief will be (Hoefle Br., page . . .).

Appellant submits that the two appellees' briefs are not fully responsive to the issues presented in the Appellant's Opening Brief and that their brusque approach toward plaintiff's music, defendants' music, the prior art and the

law is wholly unwarranted by the record, particularly when it is considered in the light of legally established principles.

In this reply brief, we discuss the matters raised by defendants generally in the order set forth in their briefs with only such changes noted as seem appropriate to correlate substantially similar subject matter.

Defendants cite the prior music art appearing in the public domain as a source both for the Schultz figure and for the putative infringing publications. In their entire argument, they have not answered plaintiff's argument that the putative infringing bars and the Schultz figure have common peculiarities (Appellant's opening brief, pages 23-27) but they have endeavored to create the impression that these peculiarities are justified by the prior art. We therefore first turn to the prior art upon which the defendants have relied and show that it is no defense to the plaintiff's claim that defendants have copied her peculiar Schultz figure.

### **Defendants' reliance on Charlier is no defense to plaintiff's claim.**

Defendants rely most heavily on Charlier's *De L' Articulation* (Ex. F. Exh. Book pp. 38-39) as a prior art source in the public domain justifying their publication of The Blacksmith Blues (Hill Brief, pp. 4, 12, 17-18). Charlier's music, speaking for itself, makes clear that it does not disclose the Schultz figure and that it is quite remote from defendants' version of that figure. For ease of comparison, the basic Schultz figure, The Blacksmith Blues version, and Charlier's figure are set forth in Plate I of an appendix to this brief, all being transposed to the same key for purposes of comparison.

Simple comparison discloses:

1. The Blacksmith Blues has the rhythm of the Schultz figure e.g. 3/16:1/16:3/16:1/16:1/8:1/4:1/8

and not the rhythm of Charlier, e.g.  $1/8:1/8:1/8:-1/8:1/8:1/8$ . This change of rhythm is not disclosed in the public domain for any do-mi-sol triad or for that matter for any other music;

2. The Blacksmith Blues and the Schultz figure both have a do-mi-sol triad with a passing note, the two differing only with respect to the exact tone quality of the passing note (fi vs. fa) and the exact value of the sol component,  $1/4$  sol,  $1/8$  sol vs.  $1/4$  sol,  $1/8$  rest) but being identical in all other respects. Charlier does not use such a figure, his figure being do-mi-do-fi-sol-mi. Therefore this phase of The Blacksmith Blues has seeming parentage in the Schultz figure and not in Charlier.
3. There is exact identity between 5 notes in The Blacksmith Blues and 5 notes in the Schultz figure in tone quality, time value and note placement in the bar (e.g. the  $3/16$  do; the  $1/16$  do; the  $3/16$  mi; the  $1/16$  mi; and the  $1/4$  sol). There is an exact identity in the time value and note placement of the passing note (e.g. the  $1/8$  fi and the  $1/8$  fa). All that Charlier discloses is that the passing note may be a fi instead of a fa. This again indicates a more probable parentage of this figure in the Schultz figure than in Charlier.

In considering Charlier, defendants urge that the plaintiff and the experts noticed a great similarity between the first four bars of Charlier, when syncopated (presumably with the plaintiff's rhythm), and The Blacksmith Blues (Hill Brief, pp. 4, 12, 17-18). There is no mystery in this, nor does that fact impinge upon plaintiff's argument that defendants have used the Schultz figure as a basis for all of the statement portions of The Blacksmith Blues. All that

defendants have shown by their demonstration is that the little answers used in The Blacksmith Blues and that the modulations of The Blacksmith Blues were taken from Charlier. This is made abundantly clear from a comparison of the first answering bars of The Blacksmith Blues and Charlier, shown in the same key for purposes of comparison, in Plate II of the appendix to this brief.

We recognize a note quality sequence for 5 notes found in The Blacksmith Blues answer in exact note quality sequence for the first 5 notes found in Charlier, e.g., do, sol, mi, fi, sol, but with a syncopated rhythm following somewhat in the steps of the Schultz figure, e.g.,  $1/4:3/16:1/16:-1/8:3/4$ . This little answer is not found in the Schultz music.

We further note that the first four bars of The Blacksmith Blues and Charlier are unmodulated, whereas the fifth through the eighth bars of The Blacksmith Blues and Charlier have both been modulated by descending the entire note formation three notes (compare Exh. Book p. 15, and Exh. Book p. 39).

Therefore, it is little wonder that there is a similarity between The Blacksmith Blues and Charlier on one hand as well as between The Blacksmith Blues and the Schultz figure on the other hand. This, by logical implication, proves merely that The Blacksmith Blues had two parents. But then plaintiff never did urge that she was any more than the parent of the Schultz figure and the syncopation in The Blacksmith Blues. Now defendants, in urging sole parentage in Charlier, actually prove:

1. That plaintiff supplied the Schultz figure used in each of the statements in The Blacksmith Blues, except for the exact note quality of the passing note. Such a peculiar statement is not found in Charlier and is not found in any of the prior art public domain material.

2. That Charlier furnished the form of answer and Schultz supplied the syncopation used in each of the answers to the statement. Such a form of answer, we admit, is not found in any of the Schultz music. And we do not charge that the answer portions of defendants' music infringes upon plaintiff's copyright, other than for the use of her syncopation.

3. That Charlier furnished the one bar statement, one bar response repetitive form of theme used in The Blacksmith Blues. This is not found in any of the Schultz music.

4. That Charlier furnished the 4 bar unmodulated formation followed by a 4 bar modulated formation of the original theme. This is not found in any of the Schultz music.

Defendants' argument thus establishes, not that plaintiff was not a source for The Blacksmith Blues, but that The Blacksmith Blues is a composite of the Schultz figure and Charlier. It also establishes that defendants are not above plagiarism because they virtually proclaim that Holmes is identical with Charlier which was copyrighted in 1926 and which did not enter the public domain until 1954, two years after defendants began to publish The Blacksmith Blues in 1952.

Plaintiff submits that this intermingling of her figure with the Charlier theme does not relieve the defendants of their legal obligations to account to her for their profits. The defense that an infringing publication is attributable to another source, where it is really a mixture, is a familiar one in copyright cases and it invariably fails.

Plaintiff's research discloses that this type of excuse was first raised in *Mawman v. Tegg* (1826), 2 Russ. 385, 38 Eng. Rep. 380. In that case Lord Eldon said, 2 Russ. 390, 38 Eng. Rep. 383:

“As to the hard consequences which would follow from granting an injunction, when a large proportion of the work is unquestionably original, I can only say, that if the parts, which have been copied, cannot be separated from those which are original, without destroying the use and value of the original matter, he who has made an improper use of that which did not belong to him must [391] suffer the consequences of so doing. If a man mixes what belongs to him with what belongs to me, and the mixture be forbidden by the law, he must again separate them, and he must bear all the mischief and loss which the separation may occasion. If an individual chooses in any work to mix my literary matter with his own, he must be restrained from publishing the literary matter which belongs to me; and if the parts of the work cannot be separated, and if by that means the injunction, which restrained the publication of my literary matter, prevents also the publication of his own literary matter, he has only himself to blame.”

The view of Lord Eldon was incorporated into our copyright law in *Callaghan v. Myers* (1888), 128 U.S. 617. In *Callaghan*, the infringing work was a composite of work in the public domain (opinions of the Illinois Supreme Court) and copyrighted material of the court reporter (headnotes, statements of the case, and abstracts of arguments of counsel). Defendant argued that the reports were public property. Plaintiff argued that he was the owner of the headnotes, etc., and that the entire work was an infringement entitling him to the entire profits. The Supreme Court held, pp. 665-666:

“If the volume contains matter to which a copyright could not properly extend, incorporated with matter proper to be covered by a copyright, the two necessarily going together when the volume is sold, as a unit, and it being impossible to separate the profits on the one

from the profits on the other, and the lawful matter being useless without the unlawful, it is the defendants who are responsible for having blended the lawful with the unlawful, and they must abide the consequences, on the same principle that he who has wrongfully produced a confusion of goods must alone suffer."

The Court then quoted the comments of Lord Eldon and continued, p. 666:

"The present is one of those cases in which the value of the book depends on its completeness and integrity. It is sold as a book, not as the fragments of a book. In such a case, as the profits result from the sale of the book as a whole, the owner of the copyright will be entitled to recover the entire profits on the sale of the book, if he elects that remedy. *Elizabeth v. Pavement Co.*, 97 U.S. 126, 139."

The same rule was again applied in *Belford v. Scribner* (1892), 144 U.S. 488. The defendant, in preparing a cook book, intermixed portions of the plaintiff's cook book with other portions which were original. At page 508, the Court said:

"The rule is well settled, that, although the entire copyrighted work be not copied in an infringement, but only portions thereof, if such portions are so intermingled with the rest of the piratical work that they cannot well be distinguished from it, the entire profits realized by the defendants will be given to the plaintiff. This was the rule laid down by this court in *Callaghan v. Myers*, 128 U.S. 617, 665, following *Mawman v. Tegg*, 2 Russell, 385, 391, and *Elizabeth v. Nicholson Pavement Co.*, 97 U.S. 126, 139."

Nor does the fact that defendants may also be liable to Charlier deprive plaintiff of her remedy. As said in an

analogous patent case of *Westinghouse Co. v. Wagner Mfg. Co.* (1912), 225 U.S. 604, 620:

“The fact that he may lose something of his own is a misfortune which he has brought upon himself; and if, as argued, the fund may have been made by the use of other patents also, for which he may be liable in another case, it is again a misfortune which he has brought upon himself and an instance of a double wrong causing double liability.”

And so in the case at bar plaintiff’s statutory claim to copyright protection is not to be “nullified” because defendants “had ingenuity enough to smother” her figure “with improvements belonging to themselves or to third persons” (Cf. *Westinghouse Co. v. Wagner Mfg. Co.* (1912), 225 U.S. 604, 615).

#### **Defendants' reliance on the Saints is no defense to plaintiff's claim.**

Defendants’ next specific reference is to “When the Saints Go Marching In” (Hill Br., p. 5). Defendants urge that this conforms notewise and “rhythmically as well” to plaintiff’s bar. The record belies this argument.

Howard Barlow, in his hearsay chart (R. 228, Exh. E, Exh. Bk. p. 34), discloses a modified version of this well-known spiritual (Bar. 8, Exh. E, Exh. Bk. p. 34). This is not a public domain version, but it is one which was used in “a picture made not long ago called ‘Ink Alley Blues’” (R. 229). This version, even if proved, is therefore not shown to be early enough to be prior art either as to plaintiff’s or as to defendants’ versions of the Schultz figure. Originally the song “was sung as rather a slow sort of a spiritual” (R. 229). Mr. Raksin demonstrated that when colored bands returned from funerals, they played it somewhat like “Waitin’ For My Baby” (R. 229). He also testi-



fied that he heard the song thus modified "in the days when I played in bands" (R. 229), but he did not testify when this was nor did he produce the orchestrations which were used by such bands. Although Mr. Raksin contended that his testimony "can be verified literally in the film and in the records" (R. 229), no such best evidence was introduced. Mr. Barlow's chart does not accord the same worth to the song since it admits that "The measures do not parallel each other" (Exh. Bk. p. 34).

The oral testimony as to the Saints cannot be given full credence because defendants did not produce the best evidence (R. 223). The rule is succinctly stated in *Interstate Circuit v. U.S.* (1939), 306 U.S. 208 at page 226:

"\* \* \* The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. (Citation omitted.)"

The rule has particular force in copyright cases, where it is well settled that oral testimony is not acceptable to prove what is in the prior public domain. For example, in *Boucicault v. Fox* (S.D.N.Y. 1862), Fed. Cas. 1691, 3 F. Cas. 977, the defendant asked an expert to compare a copyrighted play with an alleged prior art novel which was not in evidence. The court held this to be improper, stating, page 979:

"\* \* \* The book was in print, and could easily have been obtained. To undertake to prove a part of its contents, or to ask the witness whether such part was identical with, or resembled passages in, the play was wholly inadmissible, under any known rule of evidence. Whenever matter which is in print or in writing is presented to a court or a jury, for the purposes of construction, or to establish proof of identity, resemblance, or dissimilarity, the documents themselves must be presented for the inspection of the triers, or, on proper reason

for their non-production being shown, their contents must be shown. The rule is trite, familiar, and imperative."

And in *Encyclopaedia Britannica Co. v. American Newspaper Ass'n* (D.N.J. 1904), 130 Fed. 460, 461-462, the court said, page 462:

"\* \* \* The opinions of experts, however competent they may be to discover plagiarisms and piracies, are secondary, and not primary, evidence."

Moreover, the best evidence in this record, which is still only hearsay (R. 228), discloses a lack of that unique commonness found in the songs at bar. Again, we revert to comparative bars; comprising in descending order in Plate III of the Appendix the Schultz figure, "The Blacksmith Blues," and the recently modified version of "When the Saints Come Marching In."

The differences are immediately apparent. In the Schultz figure and in "The Blacksmith Blues," the passing note has a value of  $1/8$ , in the Saints it has a value of  $1/4$ ; in the Schultz figure and in "The Blacksmith Blues," the passing note occupies the first half of the third beat of the bar, in the Saints it occupies the entire last beat of the bar; in the Schultz figure and in "The Blacksmith Blues," the sol note includes a  $1/4$  sol note in the last half of the third beat and in the first half of the fourth beat, in the Saints the sol component commences with a full note occupying the entire four beats of one entire bar.

The difference in rhythm is even more pronounced. The Schultz figure and "The Blacksmith Blues" use a rhythm of  $3/16: 1/16: 3/16: 1/16: 1/8: 1/4: 1/8$ . The Saints, as modified, uses an entirely different rhythm of  $3/16: 1/16: 3/16: 1/16: 1/4: 1/1: 1/4$ . The unique  $1/8: 1/4: 1/8$  variation in

the last half of the bar is completely lacking in the Saints and in any other prior art.

Certainly the possible parentage between the modified Saints, even if the hearsay, secondary evidence be given complete credence, and "The Blacksmith Blues" is far more remote than the probable parentage between the Schultz figure and "The Blacksmith Blues."

**Defendants' reliance on Mozart is no defense to plaintiff's claim.**

The third specific prior art upon which defendant relies is a passage from a Mozart symphony (Hill Brief, pp. 5, 17). This passage, also, is from Mr. Barlow's hearsay chart (R. 230-231, Exh. Book p. 34).

For comparison, we chart the Schultz figure, The Blacksmith Blues figure and the Mozart figure in downwardly descending order in Plate IV of the Appendix to this Brief. It there appears that Mozart is even more remote from the Schultz figure than the art discussed above. Its rhythm is  $1/8:3/32:1/32:1/8:3/32:1/32:1/8:3/32:1/32$  as compared to  $3/16:1/16:3/16:1/16:1/8:1/4:1/8$  of Waitin' For My Baby and The Blacksmith Blues. It has no passing note component of any kind. It has the do, the mi, and the sol components each broken into two isolated components separated by a  $3/32$  rest. The second half of the do and mi components are exactly  $1/4$  of the first half of the do and mi components, whereas in the Schultz figure the second half is exactly  $1/3$  of the value of the first half of the component.

As a matter of fact, this passage is identical with the passage from "La Czarina", which Mr. Schneider discussed on cross-examination (compare Exh. Book p. 34, top bar and third bar from top; R. 173-176; R. 230-231). Mr. Schneider said that "The way it is usually played" (R. 176) you couldn't tell the difference in note sizes. In this

Mr. Raksin agreed (R. 231-232). Thus, defendants' own evidence shows that an adherence to the public domain source would have induced defendants to follow this known prior art notation rather than the unique and theretofore unknown plaintiff's "absolutely infinitesimal" change in notation (R. 232). Thus, the present reliance on Mozart tends to strengthen the case as to copying rather than to weaken it. As said in *Callaghan v. Myers* (1888), 128 U.S. 617:

"\* \* \*, there are certain unmistakable *indicia*, that in every volume prepared by the defendants they have not confined themselves solely to the original sources of information \* \* \*." (p. 661)

"\* \* \* one of the most significant evidences of infringement exists frequently in the defendants' volumes, namely, the copying of errors made by Mr. Freeman." (p. 662)

It cannot be gainsaid that if defendants had followed Mozart they would have had the result of Ganne and not The Blacksmith Blues use of the Schultz figure. As Judge Learned Hand said in *Fred Fisher, Inc. v. Dillingham* (S.D. N.Y. 1924), 298 Fed. 145, at page 150:

"\* \* \* If he claims the rights of the public, let him use them \* \* \*. That domain is open to all who tread it; not to those who invade the closes of others, however similar."

### **Defendants' reliance on Gluck is no defense to plaintiff's claim.**

Defendants further specifically rely upon "a theme from Gluck" (Hill Brief, p. 5, Exh. Book p. 31). In the first place, this exact notation is not shown to be in the public domain. Mr. Raksin obtained his charted version of Gluck not from a prior art publication but from a book which was copyrighted in 1950 (R. 260-261). The chart therefore is not even based upon the best evidence of that which was in the public

domain but is based upon hearsay of that which is in the public domain. Plaintiff preserved her objection to the hearsay character of these charts (R. 223-224), but was overruled (R. 223, 261).

In the second place, even if the chart be given full credence as recording that which was in fact in the public domain, it makes clear the lack of substance of any defense based upon this notation. Again, for ease of comparison, the Schultz figure, The Blacksmith Blues figure and the Gluck figure are noted in the same key in downwardly descending order in Plate V of the Appendix to this Brief.

The comparison, speaking for itself, discloses that in Gluck the triad comprises only three beats, the first beat consisting of the last beat of one bar and the second and third beats consisting of the first and second beats of another bar. On the other hand, the Schultz figure and The Blacksmith Blues encompass the entire triad in a single bar. Moreover, the sol note of the triad is but a  $1/8$  note and has no identity timewise to the  $1/4$  note used both in the Schultz figure and in The Blacksmith Blues. Finally the duration of the triad does not use the  $3/16:1/16$  beat used in many of the bars of plaintiff's and defendants' works. It is therefore clear that defendants could not have followed Gluck in making the infringing music.

**Defendants' reliance on Bach is no defense to plaintiff's claim.**

Defendants further rely upon Bach (Hill Brief, p. 17) as a source of defendants' music. Plaintiff finds no mention of Bach at the record references given (R. 167, 226-232, Hill Brief, p. 17). There is a Bach Italian Concerto referred to in Exhibit E (Exh. Book, p. 33), but its exact character is made dubious not only by the hearsay nature of the chart (R. 223), but also by the question mark in the designation for the bar (Exh. Bk., p. 33). More importantly, Mr. Raksin,

“\* \* \* It’s a series of syncopation that creates an effect. I am claiming that I originated the effect. I don’t know if I make myself clear, sir.” (R. 136)

Therefore, in this record, it is clear that plaintiff has not admitted in any way that her syncopation is old or that her Schultz figure is old. And the record discloses that both are original and that both are used in “The Blacksmith Blues.”

*Second*, after mentioning Charlier which has been analyzed above, this brief, pp. 2-8, defendants turn to Mr. Schneider’s public domain sources, and to his general oral testimony (Hill Brief, pp. 3-4; Hoefle Brief, p. 2). Mr. Schneider’s chart is in evidence for the purposes of illustrating his testimony rather than to prove the facts (R. 160, Exh. D, Exh. Bk. p. 30). Although it was admitted that the time values on this exhibit were somewhat in error (R. 179-180), an inspection of the exhibit discloses no identity of note quality plus time value plus note placement in the bar in common to both the Schultz figure and “The Blacksmith Blues” (Exh. D, Exh. Bk. p. 30). Defendants, in all their argument point to none. Mr. Schneider was able to point to none, even upon a searching cross examination (R. 169-188).

*Third*, defendants also (Hill Br., pp. 4-5) turn to Mr. David Raksin’s charts (Exh. E, Exh. Bk. 31-35). Although one of these charts is admitted hearsay, having been produced by Harold Barlow (R. 228), an inspection discloses that none of them has the unique commonness found in the Schultz figure and “The Blacksmith Blues.” Defendants recognize this defect in their proclamation that \* \* \* “the difference in the form of notation exists on paper, but not in its performance.” (Hill Br., p. 5).

Defendants’ citation of so many prior public domain sources on what now seems to be a simple figure “in itself

is evidence of the weakness of the contention" for it suggests that "none of them is in point" (*Reynolds v. Whitin Mach. Works* (4th Cir. 1948) 167 F.2d 78, 83-84; Cf. *Vegetable Oil Products Co. v. Dorward & Sons Co.* (N.D. Cal. S.D. 1943), 53 F. Supp. 281, 285).

In summation, plaintiff submits that the record in this case, particularly in view of defendants' argument, clearly establishes that there is no prior art source which discloses all of the common factors of the Schultz figure and "The Blacksmith Blues" variation. The two figures have such a unique similarity that it cannot be explained away by a shotgun sweep of the prior public domain sources.

**Defendants' reliance on the District Court's findings with respect to prior art is misplaced.**

Interspersed throughout their discussion of the prior art, defendants refer to the prior art comparatively both as indicating that "The Blacksmith Blues" is virtually the same as Charlier and that the Schultz figure is practically the same not only note wise but also rhythmically to the prior art and they infer that the court's generalized findings, discussed in detail in appellant's opening brief pp. 35-47, support their present argument. Plaintiff submits on the other hand that the defendants' present argument goes beyond the findings of fact actually entered in this record and that the District Court refused to enter findings of fact which would have tended to support the defendants' present argument.

It appears from the typed transcript, page 82, that the court struck proposed finding 10 submitted by attorneys for certain of the defendants. Proposed Finding 10 recited:

"10. The musical content of the musical themes of the first two bars of plaintiff's compositions, which themes appear elsewhere in said compositions, shows substantial similarity to previously published material,

much of which dates from the 18th and early 19th Centuries, and has become a part of the public domain of music; said musical content shows no significant modification, variation or improvement by plaintiff upon said public domain and other previously published material."

At the same time, the court struck proposed conclusion of law IV appearing at page 84 of the typed transcript as follows:

"IV

The musical content of plaintiff's compositions 'Good Old Army' and 'Waitin' For My Baby,' insofar as such musical content bears any resemblance to 'Happy Pay Off Day' and 'The Blacksmith Blues,' lacks originality and is not subject to copyright registration or to exclusive appropriation of any person or persons whatsoever, and the copyrights heretofore issued therein are to that extent void, and of no force and effect."

Thus, the District Court refused to find the absence of originality which defendants now urge. This is equivalent to a negative finding against the defendants upon this issue.

In *Miller v. Life Insurance Company* (1870), 12 Wall. (79 U.S.) 285, the court pointed out, page 300:

"\* \* \* Rejected by the Circuit Court as the several requests under consideration were, it is too plain for argument that no one of the propositions of fact therein contained is found to be true by the Circuit Court.  
\* \* \*"

*Wilhartz v. Turco Products* (7th Cir. 1947), 164 F.2d 731, 733, is to the same effect.

**Defendants' argument on dissimilarity evades the question.**

Plaintiff in her opening argument showed substantial similarities between the Schultz figure and all of the state-



ments of "The Blacksmith Blues" in specific detail. Defendants' counter-showing does not take real issue with the representations which plaintiff made as to the similarities but seeks to avoid this showing by urging inconsequencia wholly apart from the unique commonness between the plaintiff's works and the putative infringements.

*First*, defendants dwell (Hill Br., p. 7) on the differences between measures 2 of the respective compositions and upon the fact that the statement bars of the two songs line up only twice in a measure by measure playing. The argument is a non sequitur. In making this argument, the defendants compare a statement form of bar used in the plaintiff's music with an answer form of bar used in defendants' music. However, plaintiff has not charged defendants with copying the entire theme of her music, but has charged defendants with copying her statements. Certainly one does not avoid infringement by changing the order in which one uses the infringing materials. For example, an alphabetical telephone directory would be infringed by a revamping of the directory in phone number arrangement (*Leon v. Pacific Telephone & Telegraph Co.* (9th Cir. 1937), 91 F.2d 484). Still one could not make a side-by-side comparison of page 2 of the alphabetical directory with page 2 of the phone number directory and find any similarity.

In attempting to shift attention from the Schultz figure, defendants urge that Charlier discloses the same melodic line precisely (Hill Br., p. 12). We have already shown that this similarity suggests only that "The Blacksmith Blues" is a combination of two sources (this brief, pp. 2-8). But this combination of the Schultz figure with the Charlier theme does not exonerate the combiner from a charge of infringement of the Schultz figure. The contrary is recognized in *Leon v. Pacific Telephone & Telegraph Co.* (9th

Cir. 1937) 91 F.2d 484. There the court characterized the facts of *Weatherby & Sons v. International Horse Agency and Exchange, Ltd.* (1910), 2 Ch. 297, 304; 79 L.J. Ch. 609, as follows, p. 487:

“\* \* \* This case deals with the claimed infringement of the copyright of a stud book published periodically. The defendants made use of the material in this book and of another book which had originated a figure system for rating breeding race horses. The infringing work was a sort of combination of the two. \* \* \*”

And in *Boosey v. Empire Music Co.* (S.D.N.Y. 1915), 224 Fed. 646, the court said, p. 647:

“The two compositions are considerably different, both in theme and execution, except as to this phrase, ‘I hear you calling me,’ and, as to that, there is a marked similarity.”

If defendants’ argument were sound, one who stole an engine from an automobile having the engine up front would be relieved of responsibility for theft if he used the stolen engine in an automobile having the engine in the rear.

*Secondly*, defendants urge that the use of the Schultz figure in modulated bars 5, 7, 13 and 15 is excused because the modulated notes do not give the same tonal impression.

Simple perception discloses that the modulated variations are substantially identical with the original variation save that the individual notes have each been collectively dropped as a unit a total of three notes. If this distinction were sound, then most of the defendants’ prior art music could not possibly be applicable in this case because in many of the cases it was essential to reduce the note structure to a common scale to demonstrate what little similarity defendants have been able to find thus far.

*Thirdly*, defendants urge that the passing note is different (Hill Br., p. 10). This is a factor which plaintiff conceded, but the fact remains that both tunes use a passing note of the same identical length located at the same identical place in the bar and having a tone quality intermediate the mi and the sol components of the triad. This argument is akin to the argument that a painter would avoid infringement by copying all of the colors of a painting except for the substitution of a light red in exactly the same spot where the original painter had used a medium red. As Mr. Justice Jackson pointed out in speaking for the court in *Graver Mfg. Co. v. Linde Co.* (1950), 339 U.S. 605, 607:

“\* \* \* One who seeks to pirate an invention, like one who seeks to pirate a copyrighted book or play, may be expected to introduce minor variations to conceal and shelter the piracy. Outright and forthright duplication is a dull and very rare type of infringement.”

Finally, defendants urge that the intent of the music is different. Plaintiff submits that she is entitled to the exclusive use of her figure regardless of the intent of the music in which it is to be used. It is analogous to the use of a serious work for a burlesque where this court held that intent was not a factor in avoiding infringement. This ruling was made in the recent case of *Benny v. Loew's Incorporated* (9th Cir. 1956), 239 F.2d 532, affirmed (1958) 356 U.S. 43.

Earlier the defense of different intent was cast aside in *Leon v. Pacific Telephone & Telegraph Co.* (9th Cir. 1937), 91 F.2d 484, at p. 486:

“\* \* \* The defendants' contention in this regard rests entirely on the proposition that the numerical directory serves a different purpose than plaintiff's alphabetical directory.”

Plaintiff, therefore, submits that defendants' argument on plaintiff's points of similarity is without substance and does not avoid the charge of infringement.

**Defendants have not distinguished plaintiff's authorities.**

Defendants (Hill Br., pp. 11-16) endeavor to distinguish plaintiff's authorities on factual bases having little to do with the legal proposition for which plaintiff cited the cases. All of these cases are cited in support of the proposition that where there is a unique similarity between two compositions which is not satisfactorily explained by the existence of common sources, the plaintiff has met her burden of proof in establishing infringement of her copyright. True, some of the authorities cited represent different types of peculiarities and a different quantum of peculiarities than those present in the case at bar. However, this is merely a matter of degree in the several factual situations involved and it is not a matter of substance in the application of the law. In the case at bar, the similarities are few but the uniqueness of these similarities is thoroughly attested by the multitude of prior art music which defendants have located, all of which fails to disclose this commonness. The very quantity of the prior art demonstrates that the Schultz figure is neither commonplace nor one readily susceptible to independent origination.

**Defendants overstate admissions as to access.**

Defendants' chapter heading (Hill Br., p. 17) is "Evidence of Use is Concededly Absent." Plaintiff conceded only that there was no direct evidence that defendants had ever seen or heard plaintiff's music. It is plaintiff's position that the circumstantial evidence of access is virtually conclusive on the instant record in view of the peculiar similarities

found in the two pieces of music and not found in the prior art. Mere repetition that the Schultz theme is a common device and mere repetition that the figure is found in numerous public domain sources in evidence (Hill Br., p. 17) do not alter the record in this case which proves that the Schultz figure and those portions of the Schultz figure which defendants have used in "The Blacksmith Blues" are not found in any of the prior art.

**Defendants' authorities are distinguished.**

Defendants set forth the law in support of their position on a page and one-half of their entire brief (Hill Br., pp. 18-19). Plaintiff submits that the authorities which defendants cite are inapposite to the facts appearing in the instant record.

*Arnstein v. Edward B. Marks Music Corporation* (2nd Cir. 1936), 82 F.2d 275 (cited Hill Br., page 18) is a case in which all that was common to the plaintiff's and to the defendant's music was found in the prior art, a factor which the court emphasized in its decision. The court, in an opinion by Judge Learned Hand, pointed out that the defense consisted of a "showing that the common parts of the two pieces have occurred elsewhere and by the denials of the persons charged with the piracy." (page 275). After discussing generally the similarities between the two pieces and the full history showing how the defendant's piece was actually composed, the court then noted, page 277:

"\* \* \* The first phrase of the infringing chorus consists of the same four notes as the first phrase of the copyrighted song; that particular sequence can be found in several earlier musical pieces and its spontaneous reproduction should be no cause for suspicion.\* \* \*"

This is a distinction of real substance over the facts at bar because here the same notes do not appear in any earlier

musical piece. Although the triad both with and without a passing note appears in a great deal of the prior art, the prior art triads are not the same notes. A note not only has tonal quality but also has time duration and relative location in a bar. The musical effect of any musical figure is an effect created by the combination of the tone quality, the time value, and the placement of the notes just as the effect of a painting is created by the choice, the shade and placement of the colors which are used.

The *Arnstein* case was distinguished in *Wilkie v. Santly Bros.* (2nd Cir. 1937), 91 F.2d 978, at page 979. The court later pointed out, page 980:

“\* \* \* The extensive and forceful similarities between the two compositions have not been satisfactorily explained by the existence of a common source nor by the alleged stereotyped conventionalities which are said to pervade popular songs.”

*Darrell v. Joe Morris Music Co.* (2nd Cir. 1940), 113 F.2d 80 (cited and quoted Hill Br., pp. 18-19) is distinguished upon the same basis as *Arnstein*. In *Darrell* the court in a per curiam opinion, following *Arnstein* but not overruling *Wilkie*, pointed out, page 80:

“\* \* \* the defendants have been able to discover substantial equivalents of that at bar in a number of pieces which appeared earlier than the plaintiff's, \* \* \*.”

In the case at bar the record discloses that there is no substantial equivalent in any piece to the unique points of similarity between plaintiff's music and defendants' music.

*Lampert v. Hollis Music* (E.D. N.Y. 1956), 138 F. Supp. 505 (cited Hill Br., page 19) is similarly distinguished. In that case the court, page 509, found that “coincidence of concept could well account for this three note sequence of tones, three times rendered in ‘Annabella’ and five times

in 'Cause I Love You,' " because "such a sequence is to be found in the well-known round 'Three Blind Mice,' and also in the composition called 'Largo al Factotum' from the 'Barber of Seville.' " As to the latter, the evidence showed that the artist "uses the same exact notes as appear in 'Annabella.' " (p. 509).

*Carew v. R.K.O. Pictures, Inc.* (S.D. Cal. 1942), 43 F. Supp. 199 (cited Hill Br., page 19) has no similarity to the case at bar. In that case District Judge Yankwich found no infringement, page 202 "because the sequence of the notes had been changed." It appeared that "the only similarity lay in the use of two of the three notes, in reverse order." On the other hand, in the case at bar, five of the notes display an exact similarity both quality wise and time value wise, i.e., the 3/16 do, the 1/16 do, the 3/16 mi, the 1/16 mi and the 1/4 sol, and there is an exact correlation between the two passing notes as to their time value and precise location in the bar.

*Newcomb v. Young* (S.D. N.Y. 1942), 43 F. Supp. 744 (cited Hill Br., page 19) is distinguished upon the same grounds as those here urged for *Arnstein, Darrell* and *Lampert*. *Newcomb* turned on the fact that the only matter having any identity between the defendants' work and the plaintiff's work was also found in the prior art. The court particularly pointed out, page 746, that "several of them are more similar to plaintiff's song than defendant's is."

Plaintiff, therefore, submits that the cases cited by defendants do not support the instant decision. In relying upon such authority, defendants merely beg the question as to whether infringement is spelled out where the common peculiarities between the two pieces *are not found in the prior art*. In all of the cited authorities, the similarities between the two pieces were found in the prior art.

**Defendants have not overcome plaintiff's attack upon the questioned findings.**

Defendants make a two page response to plaintiff's attack upon the findings of fact entered by the District Court (Hill Br., pp. 20-21).

With respect to Finding 5, plaintiff adheres to her opening statement that Holmes "wrote" the pieces of music but submits that this is not a concession that he "composed" the music or that the compositions were "original." Plaintiff adheres to her argument (opening brief, pp. 35-36) that there is no evidence in this record that Holmes was the composer of the music or that it was original. It is now clear that the evidence to the contrary establishes that Holmes merely combined the best parts of plaintiff's music and Charlier's music in writing "The Blacksmith Blues."

Defendants seek to support the licensing part of Finding 6 on the ground that the verified answers contain allegations to that effect. It is clear that the allegations of an answer are not evidence sufficient to support a finding of fact.

Defendants have not responded specifically to the remaining contentions on the findings discussed in appellant's opening brief, pp. 37-47 other than to urge that the evidence discussed in earlier portions of defendants' argument supports these findings (Hill Br., p. 21). Plaintiff submits that such an argument is not responsive and that so far as it is responsive this reply brief shows its lack of substance.



**CONCLUSION**

Plaintiff submits that the defendants have not overcome the affirmative position taken by her in her opening brief in which plaintiff showed that the common peculiarities between the two sources were such as to create circumstantial evidence of access and copying. Defendants' argument to the contrary that the peculiarities are not actually peculiar but are found in the prior art is not supported by the evidence and is not supported by any findings of the District Court. On such a record, the defendants had the burden of explanation, a burden which they did not meet. Plaintiff, therefore, prays that the judgment of the District Court be reversed with instructions to enter judgment in accordance with the plaintiff's prayer for relief set forth in her amended complaint.

Respectfully submitted,

CARL HOPPE  
JAMES F. MITCHELL  
2610 Russ Building  
San Francisco 4, California

THOMAS P. MAHONEY  
4055 Wilshire Boulevard  
Los Angeles 5, California

*Attorneys for Appellant*

**(Appendix follows)**







## *Appendix*

### Plate I



Comparison of  
The Schultz figure (Exh. Bk., p. 7)  
The Blacksmith Blues (Exh. Bk., p. 14)  
Charlier (Exh. Bk., p. 39)

## Plate II



Comparison of  
The Schultz figure (Exh. Bk., p. 7)  
The Blacksmith Blues (Exh. Bk., p. 14)  
Charlier (Exh. Bk., p. 39)

Plate III



Comparison of

The Schultz figure (Exh. Bk., p. 7)

The Blacksmith Blues (Exh. Bk., p. 14)

The Saints Go Marching In (Exh. Bk., p. 34)

## Plate IV



## Comparison of

The Schultz figure (Exh. Bk., p. 7)

The Blacksmith Blues (Exh. Bk., p. 14)

Mozart Symphony (Exh. Bk., p. 34)



Plate V



Comparison of  
The Schultze figure (Exh. Bk., p. 7)  
The Blacksmith Blues (Exh. Bk., p. 14)  
Gluck (Exh. Bk., p. 31)

## Plate VI



Comparison of  
The Schultz figure (Exh. Bk., p. 7)  
The Blacksmith Blues (Exh. Bk., p. 14)  
Bach Concerto (Exh. Bk., p. 33)

Plate VII



Comparison of  
The Schultz figure (Exh. Bk., p. 7)  
The Blacksmith Blues (Exh. Bk., p. 14)  
Old Black Joe (Exh. Bk., p. 30)



---

---

**United States Court of Appeals**  
**FOR THE NINTH CIRCUIT**

---

**GREAT NORTHERN RAILWAY COMPANY,**  
a Corporation,

*Petitioner,*

vs.

**THE DISTRICT COURT FOR THE NORTHERN DIS-**  
**TRICT OF CALIFORNIA and EDWARD T. HYDE,**

*Respondents.*

---

**RESPONSE AND ANSWER OF RESPONDENT,**  
**EDWARD T. HYDE, TO RELATOR'S PETITION**  
**FOR A WRIT OF MANDAMUS OR WRIT OF**  
**PROHIBITION**

**AND BRIEF IN SUPPORT THEREOF**

---

**EUGENE A. RERAT**

610 Baker Building  
Minneapolis, Minnesota

**L. CHARLES GAY**

311 California Street  
San Francisco, California

*Attorneys for Respondents*

*Of Counsel:*

**HARRY H. PETERSON**

505 Minnesota Federal Building  
Minneapolis, Minnesota

FILE

APR 28 1958

PAUL P. GILLIN, C



## SUBJECT INDEX

|   | Page |
|---|------|
| Response and Answer of Respondent, Edward T. Hyde,<br>to Relator's Petition for a Writ of Mandamus or Writ<br>of Prohibition .....  | 1    |
| Brief in Support of Response and Answer of the Re-<br>spondent, Edward T. Hyde.....   | 5    |
| Statement of Facts.....   | 5    |
| Nature of Venue Litigation in Minnesota Federal<br>Court and U. S. Court of Appeals for the Eighth<br>Circuit .....   | 7    |
| The California Federal Court Decision.....  | 10   |
| <br>Argument :  |      |
| I. This Court Being Authorized by 28<br>U.S.C.A., Sec. 1651, to Issue Mandamus and<br>Prohibition Only Agreeable to the Usages<br>and Principles of Law, Should Deny Both<br>Writs as Being Contrary to Such Usages<br>and Principles ..... | 12   |
| (a) Mandamus does not lie according to<br>well settled usages and principles of<br>law to review and set aside an inter-<br>locutory decision of a District Court .....   | 14   |
| (b) Prohibition does not lie according to<br>well settled usage and principles of<br>law to review and set aside an inter-<br>locutory decision of a District Court .....   | 18   |
| (c) Mandamus does not lie to review or<br>reverse an interlocutory decision of a<br>district judge or to decide a case dif-<br>ferently from what he has already<br>done .....  | 19   |
| (d) Prohibition does not lie to undo deci-<br>sions already rendered .....  | 22   |
| (e) Mandamus and prohibition would be<br>futile in this case and therefore<br>should not be granted .....   | 22   |

|  |    |
|--|----|
| (f) This Court has adopted the rule that mandamus and prohibition do not lie to review an order denying a transfer under 28 U.S.C.A., Sec. 1404(a) ..... | 23 |
|--|----|

|   |    |
|---|----|
| II. The California Federal Court, as the Transferee Court, Properly Refused to Re-Examine the Transfer Order Made by the Minnesota Federal Court Upon the Grounds of Orderly and Judicial Administration and Comity ..... | 28 |
|---|----|

|  |    |
|--|----|
| III. The California Federal Court, as the Transferee Court, Lacked Jurisdiction to Re-examine the Transfer Order of the Minnesota Federal Court and to Thereafter Re-Transfer the Case ..... | 32 |
|--|----|

|   |    |
|---|----|
| IV. The Transfer Order Made by the Minnesota Federal Court According to the Statute Exhausted All Jurisdiction of the Federal Courts to Order Another Transfer in Invitum ..... | 34 |
|---|----|

|   |    |
|---|----|
| V. The California Federal Court Was Bound by the Transfer Order of the Minnesota Federal Court Under Section 1404(a) as the Law of the Case ..... | 36 |
|---|----|

|   |    |
|---|----|
| VI. This Court Should Deny Mandamus and Prohibition for the Reason Stated Above Even Though This Court Might Otherwise Have the Power to Grant Such Writs ..... | 37 |
|---|----|

|  |    |
|--|----|
| VII. The Transfer Order of the Minnesota Federal Court Is Res Judicata as to the Proper Place of Trial ..... | 38 |
|--|----|

|  |    |
|--|----|
| VIII. This Court Should Deny Mandamus and Prohibition as Being in Effect Procedures to Secure the Review of a Non-Appealable Interlocutory Order ..... | 38 |
|--|----|

|  |    |
|--|----|
| IX. This Court Should Deny Mandamus and Prohibition in the Exercise of Sound Judicial Discretion ..... | 39 |
|--|----|

|                  |    |
|------------------|----|
| Conclusion ..... | 39 |
|------------------|----|



# **AUTHORITIES CITED**

| <b>Cases:</b>   | <b>Page</b>                |
|---|----------------------------|
| Atlantic Coastline R. Co. v. Davis (5 Cir.), 185 F.2d 766 .....   | 25, 32                     |
| Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 74 S.Ct. 145, 98 L.Ed. 106.....   | 14, 15, 17, 23, 27, 38     |
| Barber Asphalt Paving Co. v. Morris (8 Cir.), 132 Fed. 945 .....  | 26                         |
| Bohnen v. Baltimore and Ohio Chicago Terminal R. Co. (D.C. N.D. Ind.), 125 F.Supp. 463 .....                                    | 31                         |
| Bouten v. Shoulders (W.D. Ken.), 116 F.Supp. 391.....   | 36                         |
| Clayton v. Warlick (4 Cir.), 232 F.2d 699.....  | 14                         |
| Carr v. Donohue (8 Cir.), 201 F.2d 426.....   | 14, 17, 20, 21, 23, 24, 26 |
| Chicago, R. I. & P. R. Co. v. Igoe, 212 F.2d 378 .....  | 26                         |
| Ex parte American Steel Barrel Co., 230 U.S. 35, 33 S.Ct. 1007, 57 L.Ed. 1379.....  | 14, 20                     |
| Ex parte Collett, 337 U.S. 55, 69 S.Ct. 949.....  | 8, 14, 25, 27              |
| Ex parte Fahey, 332 U.S. 258, 67 S.Ct. 1558, 91 L.Ed. 2041 .....  | 14, 23                     |
| Ex parte Johns, 191 U.S. 93, 24 S.Ct. 27, 48 L.Ed. 110 .....  | 18, 22                     |
| Ex parte Newman, 14 Wall. 152, 20 L.Ed. 877.....  | 21                         |
| Ex parte Simons, 247 U.S. 231, 38 S.Ct. 397 .....   | 25                         |
| Federal Savings & Loan Ass'n v. Reeves (8 Cir.), 148 F.2d 731 .....   | 22                         |
| Ford Motor Co. v. Ryan (2 Cir.), 182 F.2d 329.....  | 23, 25, 26                 |
| Great Northern Railway Company v. Edward T. Hyde, 236 F.2d 852.....   | 37                         |
| Great Northern Railway Co. v. Edward T. Hyde (8 Cir.), 238 F.2d 852, 245 F.2d 537, cert. den. 355 U.S. 872, 78 Sup.Ct. 117..... | 14, 39                     |
| Gulf Research & D. Co. v. Schlumberg Well Sur. Corp. (D.C. De.), 98 F.Supp. 198, affirmed (3 Cir.) 193 F.2d 302 .....           | 28, 29, 31                 |
| Gulf Research & Dev. Co. v. Harrison, Dist. Judge, 185 F.2d 457 .....   | 31, 37, 39                 |
| Hassen v. United States (D.C. E.D. N.W.), 66 Fed. Supp. 759 .....   | 32, 33                     |

|  | Page                       |
|--|----------------------------|
| Hyde v. Great Northern Railway Company (8 Cir.), 238 F.2d 852 .....                          | 6                          |
| Hyde v. Great Northern Railway Company (8 Cir.), 245 F.2d 537 .....                          | 6                          |
| Hydraulic Press Mfg. Co. v. Moore (8 Cir.), 185 F.2d 800                                     | 21                         |
| Internatio-Rotterdam, Inc., v. Thomsen (4 Cir.), 218 Fed. 514 .....                          | 28                         |
| In re Josephson (1 Cir.), 218 F.2d 174 .....   | 14                         |
| Kilpatrick v. Texas & P. R. Co., 337 U.S. 75 .....   | 27                         |
| La Buy v. Howes Leather Co., Inc., 352 U.S. 249 .....  | 10                         |
| Larsen v. Nordbye (8 Cir.), 181 F.2d 765 .....   | 14, 17                     |
| Magnetic Eng. and Mfg. Co. v. Dings Mfg. Co. (2 Cir.), 178 F.2d 866 .....                    | 36                         |
| McClellan v. Carland, 217 U.S. 268, 30 S.Ct. 501 .....                                       | 25                         |
| Nicol v. Koscinski (6 Cir.), 188 F.2d 537 .....  | 26                         |
| Norwood v. Kirkpatrick, 349 U.S. 29, 75 S.Ct. 544 .....                                      | 22, 25, 27, 36             |
| Paramount Pictures v. Rodney (3 Cir.) 186 F.2d 111 ..  | 25                         |
| Rinaldi v. The Elizabeth Bakke (D.C. N.D. Cal. S.D.), 107 F.Supp. 975 .....                  | 28, 29, 30, 31             |
| Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 63 S.Ct. 938, 87 L.Ed. 1185 .....               | 14, 19, 23, 24, 26, 27, 38 |
| Shapiro v. Bonanza Hotel Co., Inc. (9 Cir.), 185 F.2d 777 .....                              | 26                         |
| Sims v. Union News Co. (D.C., S.N.Y.), 120 F.Supp. 116 .....                                 | 22                         |
| United States Alkali Export Assn. v. U. S., 325 U.S. 196, 65 S.Ct. 1120, 89 L.Ed. 1554 ..... | 38                         |
| United States v. 23 Gross Jars, etc. (N.D. Oh. E.D.), 86 F.Supp. 824 .....                   | 29                         |
| United States v. Hoffman, 4 Wall. 158, 18 L.Ed. 110 ..                                       | 22                         |
| United States v. Hoffman, 4 Wall. 158, 18 L.Ed. 354 ..                                       | 18                         |
| United States v. Lawrence (1795), 3 Dall. 42, 1 L.Ed. 502 .....                              | 14, 15                     |
| United States, etc., v. Maine Potato Growers, etc., 88 F.2d 780, 66 U.S. D.C. App. 398 ..... | 15                         |
| United States v. National City Lines, 337 U.S. 78 .....                                      | 27                         |

|  |                |
|--|----------------|
| United States v. Nordbye (8 Cir.), 75 F.2d 744.....                            | 14, 21, 22, 24 |
| United States v. Six Dozen Bottles, etc. (D.C. E.D. Wis.), 55 F.Supp. 458..... | 34, 35         |
| United States v. United States District Court (6 Cir.), 209 F.2d 575.....      | 32, 33         |
| United States v. United States District Court (8 Cir.), 226 F.2d 238.....      | 31, 34         |
| Wilson v. Kansas City Southern Ry. Co. (W.D. Mo.), 101 F.Supp. 56.....         | 31             |
| Wiren v. Laws (D.C., 194 F.2d 873 .....  | 26             |

**Statutes:**

|                                 |                                     |
|---------------------------------|-------------------------------------|
| 28 U.S.C.A., Sec. 1291 .....    | 13                                  |
| 28 U.S.C.A., Sec. 1292 .....    | 13, 27                              |
| 28 U.S.C.A., Sec. 1404(a) ..... | 5, 7, 8, 13, 14, 21, 24, 26, 27, 37 |
| 28 U.S.C.A., Sec. 1651 .....    | 12, 13, 18, 25                      |

**Textbook References:**

|   |        |
|---|--------|
| 30 Am. Jur., Judgments, Sec. 363.....   | 38     |
| 35 Am. Jur., Sec. 255.....  | 26     |
| 35 Am. Jur., Mandamus, Secs. 258-259.....                                       | 15     |
| 42 Am. Jur., Prohibition, Sec. 30, pp. 165-166.....                             | 18, 22 |
| 54 Am. Jur., United States Courts, 1957 Pocket Parts, page 106, note 10:35..... | 29     |
| 50 C.J., Prohibition, Sec. 18, pp. 662-663.....                                 | 18     |
| 73 C.J.S., Prohibition, Sec. 10, pp. 30-31.....                                 | 18     |
| Anno.: 99 L.Ed. 805.....  | 29     |

**Rules:**

|  |        |
|--|--------|
| Federal Rules of Civil Procedure, Rule 73..... | 13, 27 |
|--|--------|



**United States Court of Appeals**  
**FOR THE NINTH CIRCUIT**

---

**No. 15975**

---

**GREAT NORTHERN RAILWAY COMPANY,**  
a Corporation,

*Petitioner,*

**vs.**

**THE DISTRICT COURT FOR THE NORTHERN DIS-**  
**TRICT OF CALIFORNIA and EDWARD T. HYDE,**

*Respondents.*

---

**RESPONSE AND ANSWER OF RESPONDENT,**  
**EDWARD T. HYDE, TO RELATOR'S PETITION**  
**FOR A WRIT OF MANDAMUS OR WRIT OF**  
**PROHIBITION**

---

Pursuant to the Court's order of April 11, 1958, the respondent, Edward T. Hyde, in his own behalf, makes response and answer why this Court should not issue a Writ of Mandamus as prayed for and why the Writ of Prohibition should not be granted as prayed for as follows:

1. This Court lacks jurisdiction to compel the United States Court for the Northern District of California, Southern Division (herein referred to as the California Federal Court), to vacate its order denying the transfer of the case of *Edward T. Hyde v. Great Northern Railway Company* from San Francisco to Seattle for trial, as prayed for in the petition.

2. This Court lacks jurisdiction to issue a Writ of Mandamus to compel the California Federal Court to make an order transferring the said case of *Edward T. Hyde v. Great Northern Railway Company* from San Francisco to Seattle for trial, as prayed for in the petition.
3. This Court lacks jurisdiction to issue a Writ of Prohibition to stay proceedings of the California Federal Court under and pursuant to its order of March 14, 1958.
4. Mandamus does not lie to compel the California Federal Court to vacate its order denying the transfer of said action of *Edward T. Hyde v. Great Northern Railway Company* from San Francisco to Seattle for trial, pursuant to the petition.
5. Mandamus does not lie to compel the California Federal Court to make an order to transfer the said case of *Edward T. Hyde v. Great Northern Railway Company* from San Francisco to Seattle for trial, pursuant to said petition.
6. Prohibition does not lie to stay the action of the California Court under and pursuant to its order of March 14, 1958.
7. The order of the California Federal Court should stand as being in all things correct as a matter of law for the reasons:
  - a. The order of the United States District Court, District of Minnesota, Third Division, by the Honorable Robert C. Bell (herein referred to as the Minnesota Federal Court), transferring the case of *Edward T. Hyde v. Great Northern Railway Company* from St. Paul, Minnesota, to San Francisco for the purposes of trial, was, as a

matter of orderly judicial administration, not reviewable by the California Federal Court.

- b. The California Federal Court, as the transferee court under Judge Bell's order, lacked jurisdiction to re-examine Judge Bell's transfer order and thereafter to re-order a transfer of the case.
  - c. The California Federal Court lacked jurisdiction to order a re-transfer of the case for the reason that the transfer power had been exhausted by the transfer order of the Minnesota Federal Court.
  - d. The California Federal Court was bound by the transfer order of the Minnesota Federal Court as the law of the case.
  - e. The order of the Minnesota Federal Court, transferring the case of *Hyde v. Great Northern Railway Company* from St. Paul, Minnesota, to San Francisco, California, for trial is *res judicata* as to the validity of the said order.
8. This Court should deny a mandamus and prohibition for the reasons stated in number 7, including paragraphs a, b, c, d and e thereof, even though this Court might otherwise have the power to grant such writs.
9. This Court should deny mandamus and prohibition as being in effect procedures to secure interlocutory review of a non-appealable interlocutory order.

10. This Court should deny mandamus and prohibition in the exercise of sound appellate judicial discretion.

Respectfully submitted,

EUGENE A. RERAT

610 Baker Building

Minneapolis, Minnesota

L. CHARLES GAY

311 California Street

San Francisco, California

*Attorneys for Respondents*

*Of Counsel:*

HARRY H. PETERSON

505 Minnesota Federal Building

Minneapolis, Minnesota



**United States Court of Appeals**  
**FOR THE NINTH CIRCUIT**

---

**No. 15975**

---

**GREAT NORTHERN RAILWAY COMPANY,**  
**a Corporation,**

*Petitioner,*

**vs.**

**THE DISTRICT COURT FOR THE NORTHERN DIS-**  
**TRICT OF CALIFORNIA and EDWARD T. HYDE,**

*Respondents.*

---

**BRIEF IN SUPPORT OF RESPONSE AND ANSWER OF**  
**THE RESPONDENT, EDWARD T. HYDE**

---

**STATEMENT OF FACTS**

The case of *Hyde v. Great Northern Railway Company* has a history of change of venue proceedings, which have extended over a period in excess of two years and have prevented the plaintiff from having his case tried. Plaintiff commenced his action against the defendant on February 23, 1956. Thereafter, as appears from the petition herein, the following change of venue proceedings under 28 U.S.C.A., Sec. 1404(a), took place:

1. Motion in Minnesota Federal Court and Order on June 20, 1956, transferring case to Southern District of California, Central Division, at Los Angeles, and denying defendant's Motion to transfer to Seattle, Washington.

2. Motion in United States District Court for Southern District of California, Central Division, and Order of July 3, 1956, re-transferring case to Minnesota Court.
3. Motion and Order of July 12, 1956, of Minnesota Federal Court transferring case to the United States District Court for the Northern District of California, Southern Division, at San Francisco, for trial.
4. Re-hearing by Minnesota Federal Court on July 31, 1956, and Order of August 2, 1956, denying defendant's Motion to transfer to Seattle, and denial thereof.
5. August 6, 1956, Petition to the United States Circuit Court of Appeals for the Eighth Circuit for Writ of Prohibition and Mandamus to compel vacation of the transfer of the Minnesota Court to the California Court and to compel the transfer of the said action to Seattle for the purpose of trial which were denied on December 18, 1956. (*Hyde v. Great Northern Railway Company* (8 Cir.), 238 F.2d 852.)
6. Petition for re-hearing of decision of the United States Circuit Court of Appeals for the Eighth Circuit denying Mandamus and Prohibition after the filing of briefs and oral arguments on said Petition, and denial thereof. (*Hyde v. Great Northern Railway Company* (8 Cir.), 245 F.2d 537.)
7. Petition to the Supreme Court of the United States to review the decision of the United States Circuit Court of Appeals for the Eighth Circuit which was denied on November 1st, 1957. (355 U.S. 872, 78 S.Ct. 117, ..... L.Ed. ....)
8. The proceedings in the California Federal Court subsequent to those above enumerated to compel the transfer of the case from San Francisco to Seattle for trial plus sixteen federal judges, including nine Judges of the Su-

preme Court of the United States, have considered and reviewed the matter of the transfer of the said action to Seattle for the purpose of trial and all sixteen have denied the defendant such a transfer.

This long and tortuous venue litigation prompted the California Federal Court to state (R. 107B) :

“This case already has been almost venued to death. While it has some judicial breath of life left it should be tried on the merits.”

Respondents will argue the several points raised in their response. For convenience, some of the points raised in the response will be grouped in connection with the legal propositions which they involve.

#### **NATURE OF VENUE LITIGATION IN MINNESOTA FEDERAL COURT AND U. S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT.**

The Minnesota Federal Court heard the defendant's motion to transfer under 28 *U.S.C.A.*, Sec. 1404(a), upon the complaint, answer and 22 affidavits filed by the parties, which are printed at pages 1 to 64 of the Record. Judge Bell, at the second hearing of the motion, made the transfer order in question, of August 2, 1956, transferring the case for trial to the Northern District of California, Southern Division, sitting at San Francisco (R. pp. 54-65).

Judge Bell's return to the petition for mandamus or prohibition in the Court of Appeals shows that he painstakingly considered all the evidence presented to him; that he evaluated the evidence and duly considered the same; that he applied to the evidence in making his determination concerning the transfer all applicable to law, including Sec. 1404(a) and the case law construing the statute; and that his decision was a sincere judicial determination of the matter. His

return sets forth these facts in paragraphs II, III, IV and VI thereof at pages 90 to 92 of the Record.

The Court of Appeals held that Judge Bell so acted, as appears from the following excerpt of its opinion (R. p. 5A) :

“Judge Bell, in his return to the defendant’s application for a writ of prohibition and mandamus, states that, in transferring the case to the Northern District of California, the Court properly exercised the judicial power and discretion vested in it by Sec. 1404(a), and that the order of transfer was in accordance with that section ‘in that it was for the convenience of the parties and witnesses, in the interest of justice.’ ”

The Court of Appeals, while differing with Judge Bell as to the merits, states (R. p. 6A) :

“\* \* \* we do not question the sincerity of the belief of Judge Bell that the transfer of the plaintiff’s case for trial at San Francisco was made in the exercise of a sound judicial discretion and in conformity with the letter and spirit of Sec. 1404(a).”

In an exceptionally able and well considered opinion by Circuit Judge John B. Sanborn, who was a special consultant assisting in drafting Sec. 1404(a) (*Ex parte Collett*, 337 U.S. 55, Note 2, at p. 66, 69 S.Ct. 949, Note 22 at p. 950, --- L.Ed. ---), the Court said (238 F.2d 852) :

“\* \* \* We are of the opinion, however, that the transfer order is not subject to review by prohibition or mandamus, despite the fact that it is not an appealable order and that an appeal from a final judgment in the case will be an adequate remedy for the erroneous transfer.”

Then, after reviewing and considering numerous authorities, the Court further said :

“The Fourth Circuit in a recent opinion by Chief Judge Parker in the case of *Clayton v. Warlick*, 232 F.2d 699, has held that, while mandamus or prohibition will lie to compel a District Judge to exercise the discretion conferred upon him by Sec. 1404(a) or to prevent him from transferring a case to a District which, as a

matter of law, it is not transferable, Sec. 1651(a) does not afford a means for the review of an order such as that here involved. The Court said (page 706 of 232 F.2d) :

‘The correct rule to be applied, we think, is the same as that applied in the case of other interlocutory orders, i.e., where the judge has exercised a power, conferred upon him by law, mandamus may not be availed of to review the exercise of the power in the face of the restriction placed by Congress on the review of interlocutory orders. The distinction which we think applicable was that drawn by the Supreme Court in *DeBeers Consolidated Mines, Ltd., v. United States*, 325 U.S. 212, 217, 65 S.Ct. 1130, 1133, 89 L.Ed. 1566, where the Court said :

‘When Congress withholds interlocutory reviews, Sec. 262 (now 28 U.S.C., Sec. 1651) can, of course, not be availed to correct a mere error in the exercise of concealed judicial power. But when a court has no judicial power to do what it purports to do—when its action is not mere error but usurpation of power—the situation falls precisely within the allowable use of Sec. 262.’

“\* \* \* We find ourselves in complete accord with the opinion in *Clayton v. Warlick*, *supra*. As Chief Judge Parker says in that opinion, the expression of the various circuits with respect to reviewability of orders of transfer under Section 1404(a), through the use of Section 1651(a), are in hopeless conflict.”

And, finally, the Court concluded :

“So far as this Court is concerned, we shall hereafter grant leave to apply for mandamus or prohibition to review transfer orders if and when an Act of Congress or a decision of the Supreme Court requires us to do so. We think that, in the interest of an expeditious, efficient and orderly administration of justice, controversies about venue should be finally settled and determined at the District Court level.”

After the Court of Appeals had denied mandamus or prohibition the petitioner obtained a rehearing of the single question as to whether the rules it applied in deciding the

case had been altered or changed by the Supreme Court of the United States in *La Buy v. Howes Leather Co., Inc.*, 352 U.S. 249, which was rendered after the Court of Appeals had rendered its decision (245 F.2d 537).

Finally, petitioner applied to the Supreme Court of the United States for certiorari to review the decision of the Court of Appeals. Certiorari was denied, 355 U.S. 872, 78 S.Ct. 117, --- L.Ed. ---.

Thereafter, the petitioner applied to Judge Bell for a rehearing of its motion to transfer to Seattle, which was denied.

### **The California Federal Court Decision.**

After all the foregoing venue litigation in the Minnesota Federal Court, the United States Court of Appeals for the Eighth Circuit, the petition to the Supreme Court of the United States for certiorari, and motion for rehearing before Judge Bell, after all the foregoing proceedings had been had, the relator-petitioner here made a motion in the California Federal Court to transfer the case for trial from San Francisco to Seattle, which motion and the affidavits in support thereof, with the exception of some affidavits to show that, subsequent to Judge Bell's order denying the last motion for a rehearing, plaintiff Hyde had made a trip from Long Beach, California, to Seattle by automobile and that two doctors at the Long Beach Veteran's Hospital would not go to either Seattle or San Francisco to be witnesses for plaintiff, were identical with original motion to transfer before Judge Bell and the affidavits filed in support thereof.

The California Federal Court, in a carefully considered and scholarly opinion, reviewed all the facts concerning the venue litigation relative to the *Hyde* case and said (R. 106B to 107B) :

“The parties admit that the Northern District of California is a District in which the action might have been

brought originally, since the defendant does business in this District and is subject to the service of process in this District. Under Section 1404(a) it is obvious that the Northern District of California is a District where the action might have been brought, and that, therefore, this Court has jurisdiction. See: *Shapiro v. Bonanza Hotel Co.*, 9th Cir., 185 F.2d 777. The effect of defendant's contention is to ask this Court to review the order of the Minnesota Court and to determine that under the facts herein stated the Minnesota Court was acting in excess of its jurisdiction because of abuse of discretion, and therefore the action should be remanded to the Minnesota Court. Regardless of what the decision of this Court would have been had defendant's motion been made to this Court in the first instance, considerations of comity require that this Court should not review the decision made by the Minnesota Court. See the opinion of Chief Judge Roche in the case of *Rinaldi v. The Elizabeth Bakke*, N.D. Cal. S.D., 107 F. Supp. 975; and *Gulf Research & Development Co. v. Schlumberger Well Sur. Corp.*, 98 F. Supp. 198.

"The considerations of comity also dispose of defendant's second contention that this Court should again review the facts and transfer the case to the Western District of Washington, Northern Division, and in effect reverse the order of the Minnesota Court. The Minnesota Court is a Court of co-ordinate jurisdiction with this Court, exercising the same powers and discretion under Section 1404(a). For this Court to attempt to review the decision of the Minnesota Court on substantially the same facts and circumstances would be both unseemly and unwise. The Court of Appeals for the Eighth Circuit, the review court for the Minnesota Court, has refused to interfere with the order of transfer made by the Minnesota Court at this stage of the proceedings, and the Supreme Court has refused to grant certiorari. To grant defendant's motion would bring about an unseemingly conflict between this Court and the Minnesota Court, when the ultimate conflict can be solved only by a higher appellate court. The granting of defendant's motion would again start the processes of appellate consideration of the jurisdiction of this

Court to make a transfer under Section 1404(a), after one transfer had been made already by a court of coordinate jurisdiction. This case already has been almost venued to death. While it has some judicial breath of life left it should be tried on the merits.”

With all the foregoing venue litigation behind us, in which federal courts at all levels from the United States District Courts to the Supreme Court of the United States have, without exception, denied relator-petitioner’s efforts to transfer the case for trial to Seattle and with over two years and some months’ delay of the trial, relator-petitioner now asks leave to file a petition for mandamus or prohibition to obtain, if possible, from this Court the very transfer order which all the foregoing federal courts have consistently denied to it.

The response states the points upon which respondent shall rely, as reasons why this Court also should deny relator-petitioner such relief.

## ARGUMENT

### I.

**THIS COURT, BEING AUTHORIZED BY 28 U.S.C.A., SEC. 1651, TO ISSUE MANDAMUS AND PROHIBITION ONLY AGREEABLE TO THE USAGES AND PRINCIPLES OF LAW, SHOULD DENY BOTH WRITS AS BEING CONTRARY TO SUCH USAGES AND PRINCIPLES.**

(This covers points 1, 2, 3, 4, 5 and 6 of the Response and Answer.)

The power of this Court, to issue writs of mandamus and prohibition, as a United States Court of Appeals, is conferred upon the Court by 28 *U.S.C.A.*, Sec. 1651, commonly known as “The All Writs Statute,” which, so far as here material, provides in Sec. 1651(a) that such courts “may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”



The statute, by the use of the conjunctive "and," plainly prescribes the existence of two requirements for the issuance of a writ of mandamus or prohibition, viz.:

1. The existence of a case, where such a writ is necessary or appropriate in aid of the jurisdiction of the United States Court of Appeals; and,
2. The issuance of the writ in the particular case would be "agreeable to the usages and principles of law."

These are concurrent requirements. If either of them is absent in the particular case, the issuance of a writ in mandamus in such a case is not authorized.

Section 1651, authorizing the issuance of writs by the United States Courts of Appeals, should be construed, as we shall show later, in connection with 28 *U.S.C.A.*, Sec. 1291, which defines the appellate jurisdiction of such courts, Rule 73 of the *Federal Rules of Civil Procedure*; and 28 *U.S.C.A.*, Sec. 1292, which enumerates the interlocutory orders from which an appeal may be taken as follows: (1) orders granting injunctions; (2) orders appointing or refusing to appoint receivers, etc.; (3) certain orders in admiralty cases; and (4) certain orders in patent infringement cases. Section 1291 authorizes appeals only from "final decisions of the district courts." Rule 73 prescribes the appellate procedure only in those cases "where an appeal is permitted by law from a district court." The enumeration in Section 1292 of the appealable interlocutory orders does not comprehend orders made under 28 *U.S.C.A.*, Sec. 1404(a), for a change of venue.

**(a) Mandamus does not lie according to well settled usages and principles of law to review and set aside an interlocutory decision of a District Court.**

The cases cited below establish beyond question that an order to transfer under Section 1404(a) made on a motion is an interlocutory order. The rule is established by all the decisions of the Supreme Court of the United States, including its first, last and all intermediate pronouncements upon the question and also by the decisions of this Court, which has not only consistently, but also correctly, followed those decisions. We shall cite only some of the cases, but at the same time shall cite some standard texts where these decisions are collected in a veritable array of authority.

*Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 74 S.Ct. 145, 98 L.Ed. 106;

*Ex parte Collett*, 337 U.S. 55, 69 S.Ct. 994, 98 L.Ed. 1207;

*Ex parte Fahey*, 332 U.S. 258, 67 S.Ct. 1558, 91 L.Ed. 2041;

*Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 63 S.Ct. 938, 87 L.Ed. 1185;

*Ex parte American Steel Barrel Co.*, 230 U.S. 35, 33 S.Ct. 1007, 57 L.Ed. 1379;

*United States v. Lawrence* (1795), 3 Dall. 42, 1 L.Ed. 502;

*Great Northern Railway Co. v. Edward T. Hyde* (8 Cir.), 238 F.2d 852, 245 F.2d 537, cert. den. 355 U.S. 872, 78 Sup.Ct. 117;

*Clayton v. Warlick* (4 Cir.), 232 F.2d 699;

*In re Josephson* (1 Cir.), 218 F.2d 174;

*Carr v. Donohue* (8 Cir.), 201 F.2d 426;

*Larsen v. Nordbye* (8 Cir.), 181 F.2d 765;

*United States v. Nordbye* (8 Cir.), 75 F.2d 744;

*United States, etc., v. Maine Potato Growers, etc.*, 88 F.2d 780, 66 U.S. D.C. App. 398.

The authorities are collected in 35 *Am. Jur.*, *Mandamus*, Secs. 258-259.

The case of *United States v. Lawrence*, *supra*, decided in 1795, was the first one to come before the Supreme Court of the United States in which it was sought, as here, to compel a district judge to decide a case in a particular way. In that case Judge Lawrence had, by an order, decided that the evidence presented to him was insufficient to authorize the issuance of a warrant to seize a ship. In holding that *mandamus* would not lie, the Court said (4 Dall. 53, 1 L.Ed. 507) :

“We are clearly and unanimously of opinion, that a *mandamus* ought not to issue. It is evident that the District Judge was acting in a judicial capacity when he determined that the evidence was not sufficient to authorize his issuing a warrant for apprehending Captain Barre; and (whatever might be the difference of sentiment entertained by this Court) we have no power to compel a Judge to decide according to the dictates of any judgment, but his own.”

In the last case of the Supreme Court of the United States deciding this question, *Bankers Life & Casualty Co. v. Holland*, *supra*, the Court reviewed many of its prior decisions. In that case, the Court granted an order of severance and transfer of the case as to one defendant on the ground that the venue laid was improper as to-wit. The Court said (346 U.S. 382-383, 74 S.Ct. 147-148) :

“The All Writs Act grants to the federal courts the power to issue ‘all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.’ 28 U.S.C., Sec. 1561(a), 28 U.S.C.A., Sec. 1651(a). As was pointed out in *Roche v. Evaporated Milk Ass’n* (1943), 319 U.S. 21, 26, 63 S.Ct. 938, 941, 87 L.Ed. 1185, the ‘traditional use of the writ in aid of appellate jurisdiction both at common

law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' Here, however, petitioner admits that the court had jurisdiction both of the subject matter of the suit and of the person of Commissioner Cravey and that it was necessary in the due course of the litigation for the respondent judge to rule on the motion. The contention is that in acting on the motion and ordering transfer he exceeded his legal powers and this error ousted him of jurisdiction. But jurisdiction need not run the gauntlet of reversible errors. The ruling on a question of law decisive of the issue presented by Cravey's motion and the replication of the petitioner was made in the course of the exercise of the court's jurisdiction to decide issues properly brought before it. *Ex parte American Steel Barrel Co.* (1913), 230 U.S. 35, 45-46, 33 S.Ct. 1007, 1010, 1011, 57 L.Ed. 1379; *Ex parte Roe* (1914), 234 U.S. 70, 73, 34 S.Ct. 722, 723, 58 L.Ed. 1217. Its decision against petitioner, even if erroneous—which we do not pass upon—involved no abuse of judicial power, *Roche v. Evaporated Milk Ass'n*, *supra*, and is reviewable upon appeal after final judgment. If we applied the reasoning advanced by the petitioner, then every interlocutory order which is wrong might be reviewed under the All Writs Act. The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction. In strictly circumscribing piecemeal appeal, Congress must have realized that in the course of judicial decision some interlocutory orders might be erroneous. The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power' of the sort held to justify the writ in *De Beers Consolidated Mines v. United States* (1945), 325 U.S. 212, 217, 65 S.Ct. 1130, 1133, 89 L.Ed. 1566. This is not such a case."

The Court further pointed out that the statutes defining the cases in which the courts of appeal have jurisdiction not only excluded by the clearest implication a right of review in other cases by other writs, such as mandamus, but also that the Congress must have contemplated that the District Courts might commit error by interlocutory orders and that such errors were to be reviewed and corrected by appeal only in the cases where the statutes authorized such appeals. The other decisions of the Supreme Court cited above use language similar to that which we have just quoted above from the *Bankers Life & Casualty* case.

In the case of *Carr v. Donohue*, supra, the Court held that mandamus and prohibition should not be issued to prevent a district judge from transferring under Section 1404(a) an act commenced in the United States District Court.

In the case of *Larsen v. Nordbye*, supra, the Court held that writ of mandamus would not issue to compel a district judge to permit the plaintiff, in an action commenced in the District Court, to dismiss without prejudice after the Court had ordered the case transferred from the District of Minnesota to the Southern District of Iowa. The Court said (181 F.2d 766) :

“It (a writ of mandamus) may issue to command judicial officers to hear and to decide a question within their jurisdiction, but courts have no power by writ of mandamus to direct such officers how they shall decide such a question, or in whose favor they shall render their judgment, because such action would result in the substitution of the judgment and opinion of the commanding court for that of the judicial officers or officers to whose judgment and discretion the law intrusted the decision of the issue. For the same reason it cannot be invoked to compel a court or a judicial officer to reverse a decision already rendered, to correct an erroneous conclusion, or to render another decision.”

**(b) Prohibition does not lie according to well settled usage and principles of law to review and set aside an interlocutory decision of a District Court.**

This rule is well settled. It makes no difference in the application of the rule whether the petitioner claims that the trial judge erred or whether the appellate court is of the opinion that error actually occurred below.

*Ex parte Johns*, 191 U.S. 93, 24 S.Ct. 27, 48 L.Ed. 110;

*U. S. v. Hoffman*, 4 Wall. 158, 18 L.Ed. 354;

42 *Am. Jur.*, *Prohibition*, Sec. 30, pp. 165-166;

73 *C.J.S.*, *Prohibition*, Sec. 10, pp. 30-31;

50 *C.J.*, *Prohibition*, Sec. 18, pp. 662-663.

Mr. Justice Miller, speaking for the Court in *U. S. v. Hoffman*, supra, aptly said (18 L.Ed. 355) :

“The writ of prohibition, as its name imports, is one which commands the person to whom it is directed not to do something which, by the suggestion of the relator, the court is informed he is about to do. If the thing be already done, it is manifest the writ of prohibition cannot undo it, for that would require an affirmative act;  
\* \* \*.”

The pertinent part of the text in 42 *Am. Jur.*, *Prohibition*, Sec. 30, supra, reads (42 *Am. Jur.*, pp. 165-166) :

“\* \* \* or, as it has sometimes been said, the writ of prohibition cannot be converted into, or made to serve the purpose of, an appeal, writ of error, or writ of review to *undo* what already has been done.”

Prohibition does not lie here for the reason that to do so would be to use the writ as an interlocutory appeal from an interlocutory order for the purpose of reviewing such order after it has become final. This would be directly contrary to well settled usage and legal principles and consequently contrary to the express provisions of 28 *U.S.C.A.*, Sec. 1651, the all writs act.

**(c) Mandamus does not lie to review or reverse an interlocutory decision of a district judge or to decide a case differently from what he has already done.**

Mandamus cannot be used as an interlocutory appeal to review interlocutory orders. The granting of a writ of mandamus to compel a district judge to vacate an order made by him or to decide a motion in a particular way contrary to what he has already decided would be not only an interlocutory review of an interlocutory decision not authorized by law, but also would be a substitution by the appellate court of its views for those of the trial court with respect to a matter committed by law to the trial court for its exclusive decision.

In *Roche v. Evaporated Milk Ass'n*, supra, the United States Court of Appeals, by mandamus, ordered the District Court to reinstate certain pleas in abatement, which the District Court had ordered stricken by an interlocutory order, and then to hear and decide such pleas. Mr. Chief Justice Stone, speaking for the Court, said (319 U.S. 25-26, 635 S.Ct. 941) :

“The common-law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court. *Ex parte Republic of Peru*, supra, 63 S.Ct. 797, and cases cited; *Whitney v. Dick*, 202 U.S. 132, 136, 140, 26 S.Ct. 584, 586, 587, 50 L.Ed. 963. Hence the question presented on this record is not whether the court below had power to grant the writ but whether in the light of all the circumstances the case was an appropriate one for the exercise of that power. In determining what is appropriate we look to those principles which should guide judicial discretion in the use of an extraordinary remedy rather than to formal rules rigorously controlling judicial action. Considerations of importance to our answer here are that the trial court, in striking the pleas in abatement, acted within its jurisdiction as a district court; that no action or omission on its part has thwarted or tends to thwart appellate review of the

ruling; and that while a function of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal, it may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute.” (Emphasis supplied.)

The Court further said, as did the Court in *Carr v. Donohue*, supra, at 201 F.2d 428 (139 U.S. 27-30, 63 S.Ct. 942-944) :

“Ordinarily mandamus may not be resorted to as a mode of review where a statutory method of appeal has been subscribed or to review an appealable decision of record. \* \* \* citing cases \* \* \*. Circuit courts of appeals, with exceptions not now material, have jurisdiction to review only final decisions of district courts, 28 U.S.C., Sec. 225(a), 28 U.S.C.A. Sec. 225(a). Respondents stress the inconvenience of requiring them to undergo a trial in advance of an appellate determination of the challenge now made to the validity of the indictment. We may assume, as they allege, that that trial may be of several months’ duration and may be correspondingly costly and inconvenient. But that inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable. Where the appeal statutes establish the conditions of appellate review an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases. *Cobbledick v. United States*, 309 U.S. 323, 60 S.Ct. 540, 84 L.Ed. 783. As was pointed out by Chief Justice Marshall, to grant the writ in such a case would be a ‘plain evasion’ of the Congressional enactment that only final judgments be brought up for appellate review. ‘The effect, therefore, of this mode of interposition, would be to retard decisions upon questions which were not final in the court below, so that the same cause might come before this Court many times, before there would be a final judgment.’ ” \* \* \* (Citing cases.)

In the case of *Ex parte Steel Barrel Company*, supra, where the Supreme Court of the United States denied a writ of mandamus to compel a judge of the Court of Appeals to



vacate an order designating a district judge to hear and decide a matter in bankruptcy, Mr. Justice Lurton, speaking for the Court, said (230 U.S. 46, 57 L.Ed. 1384) :

“Judge Lacombe was clearly called upon to determine, in the exercise of his jurisdiction as the senior circuit judge, whether the situation was one in which he should designate a judge in the room and place of Judge Chatfield. He determined the matter adversely to the petitioners. If in this he made a mistake, it was one made in the course of the exercise of his legitimate jurisdiction under Sec. 14 of the new Judicial Code, and we cannot compel him through a writ of mandamus to undo what has thus been done. *Ex parte Burtis*, 102 U.S. 238, 26 L.Ed. 392; *Re Parson*, 150 U.S. 150, 37 L.Ed. 1034, 14 Sup. Ct. Rep. 50.”

In *United States v. Nordbye* (8 Cir.), 75 F.2d 744, the Court denied a writ of mandamus to compel a district judge to allow an appeal. The Court said (75 F.2d 745) :

“Mandamus is ordinarily a remedy for official inaction, and not to compel the undoing of acts already done, or to correct wrongs already perpetrated.”

The effect of granting the writ here would not only be to “undo” what Judge Bell has decided, but also for this Court to decide a question which Section 1404(a) has committed to Judge Bell as a district judge for his decision.

In the case of *Ex parte Newman*, 14 Wall. 152, 20 L.Ed. 877, the Court held that mandamus would lie to counsel a lawyer or court to take jurisdiction of a case and to exercise judicial power and discretion, but “without any direction as to the manner in which it shall be done.”

The views above expressed have been adopted as the rule of other courts.

*Hydraulic Press Mfg. Co. v. Moore* (8 Cir.), 185 F.2d 800;

*Carr v. Donohue*, *supra*;

*United States v. Nordbye* (8 Cir.), 75 F.2d 744;  
*Federal Savings & Loan Ass'n v. Reeves* (8 Cir.), 148  
 F.2d 731.

**(d) Prohibition does not lie to undo decisions already rendered.**

What has been said under (b), *supra*, would suffice.

*Ex parte Johns*, 191 U.S. 93, 24 S.Ct. 27, 48 L.Ed. 110;  
*U. S. v. Hoffman*, 4 Wall. 158, 18 L.Ed. 110;  
 42 *Am. Jur.*, *Prohibition*, Sec. 30, pp. 165-166.

The latest expression of the Supreme Court of the United States warns that, although the Courts of Appeal have issued writs of mandamus and prohibition in cases arising, Section 1404(a), neither the bench nor the bar were warranted in assuming that either of such writs is a "proper remedy." In *Norwood v. Kirkpatrick*, 349 U.S. 29, 75 S.Ct. 544, the Court said (349 U.S. 33):

"Since we find that the district judge properly construed Sec. 1404(a), it is unnecessary to pass upon the question of whether mandamus or prohibition is a proper remedy."

**(e) Mandamus and prohibition would be futile in this case and therefore should not be granted.**

Mandamus and prohibition are not only not appropriate as remedies, but also to grant either one of them would be futile for the reason that the order which was made below transferring the case divested the court below of jurisdiction and rendered it impotent to take any further action with respect to the matter.

In *Sims v. Union News Co.* (D.C., S.N.Y.), 120 F.Supp. 116, 117, it was held that a voluntary dismissal by plaintiff was ineffective after the Court had ordered the transfer of the action under Section 1404(a), even though the clerk had not physically transferred the papers. The Court said:

“(2) The fact that the clerk has not yet physically transferred the papers to the Eastern District of South Carolina because plaintiff’s counsel by letter of February 11, 1954, requested him not to do so, does not alter my belief that this cause has been effectively transferred out of this jurisdiction.”

**(f) This Court has adopted the rule that mandamus and prohibition do not lie to review an order denying a transfer under 28 U.S.C.A., Sec. 1404(a).**

*Carr v. Donohue* (8 Cir.), 201 F.2d 426.

The rule laid down in *Carr v. Donohue*, supra, is in accord with the decisions of the Supreme Court of the United States in cases which we have cited supra. Most of these decisions were reviewed in *Carr v. Donohue*, supra.

In *Ford Motor Co. v. Ryan* (2 Cir.), 182 F.2d 329, Judge Frank held that mandamus would lie for the reason that an erroneous decision with respect to transfer was “incorrigible on appeal” from the judgment. (182 F.2d 330.) Judge Learned Hand expressed no views with respect to the appropriateness of mandamus as a remedy. Judge Swan dissented from the views of Judge Frank. All three of the judges voted to deny mandamus because defendant had failed to sustain the burden of proof as the moving party. Judge Frank’s view that an interlocutory order denying transfer is not reviewable on appeal and that lack of right of review was a ground for granting mandamus is squarely opposed to the views of the Supreme Court of the United States and of this Court in the following cases:

*Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 74 S.Ct. 145, 98 L.Ed. 106;

*Ex parte Fahey*, 332 U.S. 258, 67 S.Ct. 1558, 91 L.Ed. 2041;

*Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 63 S.Ct. 938, 87 L.Ed. 1185;

*Carr v. Donohue* (8 Cir.), 201 F.2d 426;

*United States v. Nordbye* (8 Cir.), 75 F.2d 744.

As said in *Roche v. Evaporated Milk Ass'n*, supra (319 U.S. 29-30):

“Circuit courts of appeals, with exceptions not now material, have jurisdiction to review only final decisions of district courts, 28 U.S.C., Sec. 225(a), 28 U.S.C.A., Sec. 225(a). Respondents stress the inconvenience of requiring them to undergo a trial in advance of an appellate determination of the challenge now made to the validity of the indictment. We may assume, as they alleged, that that trial may be of several months’ duration and may be correspondingly costly and inconvenient. But that inconvenience is one which we must take it Congress contemplated in providing that only final judgments would be reviewable. Where the appeal statutes establish the conditions of appellate review an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases. *Cobbledick v. United States*, 309 U.S. 323, 60 S.Ct. 540, 84 L.Ed. 783. As was pointed out by Chief Justice Marshall, to grant the writ in such a case would be a ‘plain evasion’ of the Congressional enactment that only final judgments be brought up for appellate review. ‘The effect, therefore, of this mode of interposition, would be to retard decisions upon questions which were not final in the court below, so that the same cause might come before this Court many times, before there would be a final judgment.’ ”

In *Carr v. Donohue*, supra, the Court held that an order granting or denying transfer under Section 1404(a) was reviewable on appeal from the final judgment. Except for Judge Frank’s statements, which seemingly were intended to be not a statement of law, but one of fact forecaste as to what might happen, is the only statement in the books to the contrary.

The case of *Paramount Pictures v. Rodney* (3 Cir.), 186 F.2d 111, expressly holds that an order denying transfer is appealable, and that mandamus will lie to compel transfer where a district judge decides it. The decision in that case is based upon the views of Judge Frank in *Ford Motor Co. v. Ryan*, supra, to the effect that such a view is not only erroneous but is in defiance of Section 1651, which permits appeals only from final judgments. It is also contrary to all the decisions of the Supreme Court of the United States which we have cited supra.

The case of *Atlantic Coastline R. Co. v. Davis* (5 Cir.), 185 F.2d 766, is based in part upon the assumption that decisions of the Supreme Court of the United States in cases such as *Ex parte Collett*, 337 U.S. 55, 69 S.Ct. 944, 93 L.Ed. 1207, and cases like *McClellan v. Carland*, 217 U.S. 268, 30 S.Ct. 501, and similar cases "tacitly" authorize the issuance of such writs. These cases are not in point for the reason that the question whether mandamus is an appropriate remedy was not raised in *Ex parte Collett*, supra, and similar cases. Nothing is said in the briefs or the decisions relative to that question. Consequently, nothing was decided by those cases relative to the question. On the contrary, the Supreme Court of the United States, in the later case of *Norwood v. Kirkpatrick*, expressly warned that it would not hold that either mandamus or prohibition was the proper remedy. This warning was to apprise the bench and bar that the Supreme Court of the United States intended to adhere to its prior decisions holding that neither mandamus or prohibition were proper remedies in such case. The case of *McClellan v. Carland* was not in point because decision there was simply with respect to a preliminary jurisdictional question. Such a decision is reviewable to compel a judge to take jurisdiction.

*Ex parte Simons*, 247 U.S. 231, 38 S.Ct. 397;

*Barber Asphalt Paving Co. v. Morris* (8 Cir.), 132 Fed. 945;

35 *Am. Jur.*, Sec. 255.

All these cases are distinguished in the case of *Roche v. The Evaporated Milk Ass'n* in the elaborate opinion by Mr. Chief Justice Stone.

The case of *Nicol v. Koscinski* (6 Cir.), 188 F.2d 537, is not in point because this point was not raised in that case. See *Chicago, R. I. & P. R. Co. v. Igoe*, 212 F.2d 378 at 380.

*Wiren v. Laws* (D.C.), 194 F.2d 873, holds that mandamus will lie because an order granting or denying transfer under Section 1404(a) is not appealable and that a review by mandamus is therefore necessary to correct the error, if any, in the order thus brought up for review. This decision follows *Ford Motor Co. v. Ryan*, supra, and the reasoning of Judge Frank in that case. It is obviously unsound for the reasons that we have mentioned.

In the case of *Shapiro v. Bonanza Hotel Co., Inc.* (9 Cir.), 185 F.2d 777, the Court holds that an order granting or reviewing transfer under Section 1404(a) is not appealable and therefore mandamus is a proper remedy to bring such orders up for review to correct any errors therein. In this respect the cited case follows the views of Judge Frank in *Ford Motor Co. v. Ryan*, supra, quoting that case. We have already pointed out that the decision is unsound, is contrary to the provisions of Section 1651 and should not be followed.

The case of *Chicago, R. I. & P. R. Co. v. Igoe* (7 Cir.), 212 F.2d 378, likewise is unsound for the following reasons: (1) it declined to follow the rule of this Court in *Carr v. Donohue*, 201 F.2d 426, supra; (2) it adopted the rule of cases like *Ford Motor Co. v. Ryan* (2 Cir.), 182 F.2d 329, and the other cases which defendant has cited and which we have distinguished, supra, and therefore is based on unsound rules; (3) the Court misconstrued the decisions of the Su-

preme Court of the United States in *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, and *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, in that it failed to recognize that these cases squarely hold that an interlocutory order can never be reviewed by mandamus or prohibition; and (4) that the Court erred in holding that review of an interlocutory order granting or denying transfer under Section 1404(a) was implicit in such cases as *Ex parte Collett*, 337 U.S. 55, supra, *Kilpatrick v. Texas & P. R. Co.*, 337 U.S. 75, and *United States v. National City Lines*, 337 U.S. 78, for the reason that the point as to the appropriateness of either mandamus or prohibition as a remedy was not raised in any one of the cited cases and therefore none of such cases should be determined an authority that either of said writs is an appropriate remedy in such a case. See *Norwood v. Kirkpatrick*, supra.

The rule laid down in the case of *Hyde v. Great Northern Railway Co.*, supra, should be adhered to because it is sound in principle and in accordance with the decisions of the Supreme Court of the United States. We think the authorities that we have cited supra adequately cover this proposition. After all, the primary concern of the Court is to establish and maintain sound legal doctrine which is just as much a concern of the bench and bar as it is that we have sound money.

Interlocutory review by mandamus and prohibition of the order of the California Federal Court is impliedly denied by 28 U.S.C.A., Sec. 1292, which defines the appellate jurisdiction of this Court under Rule 73 of the *Federal Rules of Civil Procedure*. Section 1292 enumerates the interlocutory orders which are reviewable on appeal. This section does not enumerate orders for the transfer of cases under Sec. 1404(a) from one district to another for the purpose of trial. The enumeration does not include such transfer orders.

Thus, the plain implication is that there shall be no interlocutory review of such orders.

## II.

### **THE CALIFORNIA FEDERAL COURT, AS THE TRANSFEREE COURT, PROPERLY REFUSED TO RE-EXAMINE THE TRANSFER ORDER MADE BY THE MINNESOTA FEDERAL COURT UPON THE GROUNDS OF ORDERLY AND JUDICIAL ADMINISTRATION AND COMITY.**

(This covers point 7a of the Response and Answer.)

The court below applied the rule stated in the caption and held :

“The effect of defendant’s contention is to ask this Court to review the order of the Minnesota Court and to determine that under the fact therein stated the Minnesota Court was acting in excess of its jurisdiction because of abuse of discretion, and therefore the action should be remanded to the Minnesota Court. Regardless of what the decision of this Court would have been had defendant’s motion been made to this court in the first instance, considerations of comity require that this Court should not review the decision made by the Minnesota Court. See the opinion of Chief Judge Roche in the case of *Rinaldi v. The Elizabeth Bakke* (N.D. Cal. S.D.), 107 F. Supp. 975, and *Gulf Research & Dev. Co. v. Schlumberger Well Sur. Corp.*”

The court below applied in its decision well settled applicable rules of law which are laid down by the following authorities :

*Rinaldi v. The Elizabeth Bakke* (D.C. N.D. Cal. S.D.), 107 F. Supp. 975.

*Internatio-Rotterdam, Inc., v. Thomsen* (4 Cir.), 218 Fed. 514.

*Gulf Research & D. Co. v. Schlumberger Well Sur. Corp.* (D.C. De.), 98 F. Supp. 198, affirmed (3 Cir.) 193 F.2d 302.



*United States v. 23 Gross Jars, etc.* (N.D. Oh. E.D.), 86 F. Supp. 824.

54 *Am. Jur., United States Courts*, 1957 Pocket Parts, page 106, note 10:35.

Anno.: 99 *L.Ed.* 805.

One of the leading cases, if not the leading case, on this question is *Rinaldi v. The Elizabeth Bakke*, supra, which was decided by the California Federal Court in a decision by Chief Judge Roche in which a libel proceeding against a vessel had been transferred by the Federal Court in New York to the California District Court for trial. In denying the motion, the Court pointed out that three other district judges had considered the jurisdictional question involved and had ruled against the owners of the vessel. The Court said (107 F. Supp. 976) :

"It is apparent from the foregoing that not one but three District judges have considered the jurisdictional question that respondent vessel has raised before this court. Respondent is thus seeking, in effect, to have this court assume the role of an appellate court in re-examining the question. This, by reason of the principle of comity and considerations for the orderly functioning of the judicial process, this court declines to do. Should this court ignore the considered judgment of the New York judges and transfer the proceedings back to the Southern District of New York, they would be under no compulsion to accept the transfer. To paraphrase the language of Chief Judge Leahy in *Gulf Research & Development Co. v. Schlumberger Well Surveying Corp.* (D.C.), 98 F. Supp. 198, under such circumstances this case could conceivably shuttle back and forth interminably between California and New York. Such an eventuality should be avoided."

In the case of *Gulf Research & D. Co. v. Schlumberger Well Sur. Corp.*, supra, Judge Harrison of the Southern District of California transferred a patent case to the District Court

of Delaware for trial. In denying a motion to remand the case to the Southern District of California, the Court said (98 F.2d 201) :

“Regardless of my own view as to whether the California Court was right in its interpretation of Sections 1391(c) and 1400(b), and, admittedly, there is serious conflict as to the proper interpretation of those sections, I do not think it meet or proper that I review Judge Harrison’s decision on the merits. To do so would be a usurpation of an appellate function; and on at least one other occasion I have refused to so act. Though counsel for plaintiff and defendant have addressed themselves both in their briefs and oral argument to the merits of Judge Harrison’s holding on the venue question, all of the contentions on the merits were before Judge Harrison. It is now for an appellate court—not for me—to correct any error, if error there be, in his opinion. It is not only the principle of comity and the fact that Judge Harrison’s opinion may be likened, at this stage, to the ‘law of this case’ which compels me to this conclusion, but what seems of most importance to me are the considerations for the orderly functioning of the judicial process. If I should grant plaintiff’s motion and say, in effect, to Judge Harrison, ‘You were wrong in transferring this case to Delaware,’ I do not think he, in turn, would be any more bound to take and try the case on the merits, thereby respecting my views, than I had shown myself to be in ignoring his considered judgment. If both Judges Harrison and I were obdurate in our positions, this case could conceivably shuttle back and forth interminably between California and Delaware. Such an eventuality should be avoided.”

This Court, in the *Rinaldi* case, *supra*, approved the language which we have quoted. Judge Leahy’s decision in the cited case was affirmed by the Court of Appeals for the Third Circuit, 218 F.2d 514, which in turn cited the case of *Rinaldi v. The Elizabeth Bakke*, *supra*, with approval and used it as the authority upon which it affirmed Judge Leahy’s decision.

There are some exceptions to the rule above stated based upon factors not involved here as, for example, (1) where either the transferor or the transferee court lacks jurisdiction of the case, *Wilson v. Kansas City Southern Ry. Co.* (W.D. Mo.), 101 F. Supp. 56, (2) where no trial is necessary and the case can be disposed of in the district where sued upon a motion to dismiss under Rule 12 or otherwise, *Bohnen v. Baltimore and Ohio Chicago Terminal R. Co.* (D.C. N.D. Ind.), 125 F. Supp. 463; (3) or where the parties stipulate for a change of venue, *United States v. United States District Court* (8 Cir.), 226 F.2d 238.

It is noteworthy that at least in the *Rinaldi* case and in the *Gulf Research & D. Co.* cases, *supra*, the judges who held the motions to re-transfer gave great weight to the decisions of the judges who made the transfers. This would seem to be the proper thing to do as a matter of orderly judicial administration and the respect and comity of courts of equal jurisdiction should show to each other. Accordingly, the California Federal Court properly refused to re-examine the transfer order of the Minnesota Federal Court.

## III.

**THE CALIFORNIA FEDERAL COURT, AS THE TRANSFEREE COURT, LACKED JURISDICTION TO RE-EXAMINE THE TRANSFER ORDER OF THE MINNESOTA FEDERAL COURT AND TO THEREAFTER RE-TRANSFER THE CASE.**

(This covers points 7b and e.)

The theory of the decisions, which support the rule as stated in the caption (and, so far as we know, there are none to the contrary) is that only an appellate court may review the decisions of any court and then only the decisions of an inferior court upon an appeal or other review proceedings, and that a court lacks jurisdiction to sit in review of the decision of a court of equal jurisdiction, especially where, as here, there is no statutory provision for such review. The exception to the rule is that a court may always examine an order or judgment for lack of jurisdiction of the particular court to render it.

*Atlantic Coast Line R. Co. v. Davis* (5 Cir.), 185 F.2d 766.

*United States v. United States District Court* (6 Cir.), 209 F.2d 575.

*Hassen v. United States* (D.C. E.D. N.W.), 66 Fed. Supp. 759.

In *Atlantic Coast Line R. Co. v. Davis*, supra, the United States District Court for the Southern District of Florida twice tried a case which had been transferred to that district from New York. After two trials, which resulted in disagreements of the juries, the District Court re-transferred the case to New York for trial. The United States Court of Appeals indicated that by so doing the District Court acted without jurisdiction and said (185 F.2d 769):

“We are of the opinion that the grounds upon which the Court rested his decision ordering the re-transfer

are so wholly insufficient to support the order and to bring it within the terms of Section 1404(a), *supra*, that the order re-transferring the case, in substance, evidences an unwarranted renunciation of jurisdiction, if not also an act beyond the Court's jurisdiction, \* \* \*."

Further, the Court of Appeals said that it was the duty of the District Court to try the case and said (185 F.2d 770) :

"Under the circumstances of this case, the re-transfer evidenced the renunciation or abandonment of a jurisdiction the Court was legally required to exercise in order to terminate the cause lawfully pending before it."

In *United States v. United States District Court*, *supra*, a criminal case was transferred from the Middle District of Tennessee to the Eastern District of Tennessee, Northern Division. In denying a motion of the defendant to re-transfer the case to the court where it originated, the Court of Appeals said (209 F.2d 577) :

"A motion to transfer a criminal prosecution begun in one federal district court having jurisdiction of the subject matter, to another district also having jurisdiction is addressed to the discretion of the district judge to whom presented; and his order transferring the case for trial in the other district is not reviewable by the judge of the latter district. See *Holdsworth v. United States* (1 Cir.), 179 F.2d 933."

Similar views are expressed by District Judge Byers in *Hassen v. United States* which involved the transfer of a libel in admiralty.

The jurisdiction to order a transfer is vested in the Court which hears the motion to transfer. The transferee court is in duty bound to accept the transfer under the rule, whether it agrees with the decision for the transfer or not. This would seem to be a salutary rule in order to facilitate the trial and disposition of cases and to avoid shuttling litigants from one court to another according to the divergent views

of the numerous judges who compose the federal judicial system.

#### IV.

### **THE TRANSFER ORDER MADE BY THE MINNESOTA FEDERAL COURT ACCORDING TO THE STATUTE EXHAUSTED ALL JURISDICTION OF THE FEDERAL COURTS TO ORDER ANOTHER TRANSFER IN INVITUM.**

(This covers points 7b and c.)

The rule stated in the caption may have its ramifications in the question of jurisdiction and it may be true that where the Court has exhausted its jurisdiction it also lacks jurisdiction. However that may be, plaintiff desires to avoid getting into any controversy as to whether exhaustion of jurisdiction also results in lack of jurisdiction. The plain fact is, however, that some of the federal courts of very high standing have taken the position that where a court has made a transfer pursuant to statutory authority that the exercise of the power exhausts it and no further power remains in any court thereafter to be exercised with respect to the matter.

*United States v. United States District Court* (8 Cir.), 226 F.2d 238.

*United States v. Six Dozen Bottles, etc.* (D.C. E.D. Wis.) 55 F. Supp. 458.

The courts in the cases which are cited above draw a sharp distinction between a transfer upon stipulation and one upon motion which is opposed by the parties.

In *United States v. United States District Court*, supra, the case in the trial court was a proceeding under the Federal Food, Drug and Cosmetic Act to condemn certain articles. The case was transferred upon order of court in invitum from a district in Tennessee to a district in Arkansas. Thereafter the parties stipulated to transfer the case from said

district in Arkansas to another district in Arkansas which better suited their convenience. The Court of Appeals for the Eighth Circuit held that there could be only one transfer by order in invitum but that there might be other transfers upon stipulation. The Court said, quoting the "*Kuriko*" case (226 F.2d 242) :

"In *United States v. Six Dozen Bottles, More or Less, of 'Dr. Peter's Kuriko'* (D.C. E.D. Wis. 1944), 55 F. Supp. 458, 459, the court denied a second request by claimant for a compulsory removal. In the opinion, Judge Duffy, now Judge of the United States Court of Appeals, 7th Circuit, said :

"*"The power of removal is exclusively conferred under the act upon the court of original jurisdiction, barring of course the existence of a stipulation of the parties on the subject. As the latter element does not obtain in the instant situation, this court has no power to grant the requested removal. In other words, the right to removal is completely exhausted and no longer exists in this proceeding."* (Emphasis supplied.)

The Court further held, on the same page, that the Court may order a further transfer upon stipulation of the parties. That question is not important here because there is no stipulation of the parties for the transfer of the instant case.

## V.

**THE CALIFORNIA FEDERAL COURT WAS BOUND BY THE  
TRANSFER ORDER OF THE MINNESOTA FEDERAL COURT  
UNDER SECTION 1404(a) AS THE LAW OF THE CASE.**

(This covers point 7d.)

It is elementary, of course, that the transfer of an action from one district to another merely transfers the case in its status as it was in the transferring district. No change is effected in the case. The right of action itself, as well as all rulings made up to the time of transfer, are reserved and carried forward into the transferee court.

*Norwood v. Kirkpatrick*, 349 U.S. 29, 75 S.Ct. 544, 99 L.Ed. 789.

*Magnetic Eng. and Mfg. Co. v. Dings Mfg. Co.* (2 Cir.), 178 F.2d 866.

*Bouten v. Shoulders* (W.D. Ken.), 116 F.Supp. 391.

In short, the transferee court takes the case from the transferor court in its exact status in the transferor court.

As said in *Magnetic Eng. and Mfg. Co. v. Dings Mfg. Co.*, supra, by Circuit Judge Learned Hand in a case involving the effect of a transfer from New York to Wisconsin (178 F.2d 868) :

“However, when an action is transferred, it remains what it was; all further proceedings in it are merely referred to another tribunal, leaving untouched whatever has been done.”

In *Bouten v. Shoulders*, supra, where a case had been transferred from the Western District of New York to the Western District of Kentucky, the Court said (116 F. Supp. 393) :

“I feel, however, that since an order has been entered transferring this case to this district, the matter of jurisdiction has been determined by the judge of the Western District of New York and is the law of the case.”



## VI.

**THIS COURT SHOULD DENY MANDAMUS AND PROHIBITION FOR THE REASON STATED ABOVE EVEN THOUGH THIS COURT MIGHT OTHERWISE HAVE THE POWER TO GRANT SUCH WRITS.**

(This covers point 8.)

The rule with respect to the power stated in the caption is settled by the decision of this Court in *Gulf Research & Dev. Co. v. Harrison, Dist. Judge*, 185 F.2d 457.

In the cited case a Petition for a Writ of Mandamus to compel Judge Harrison to withdraw an order transferring a case for the Southern Division of California, Central Division, to the District of Delaware, for trial under 28 U.S.C.A., Sec. 1404(a), this Court denied the petition in an opinion written by Circuit Judge Orr who, speaking for the Court, said :

“In this case, no extraordinary circumstances have been called to our attention. Petitioner alleges nothing more than an erroneous application of the law. The error, if any, will be reviewable on appeal to the Court of Appeals for the Third Circuit, after the final judgment has been entered. Mandamus cannot be subverted to perform the function of an interlocutory appeal, over which we have no jurisdiction. The inconvenience of proceeding to what may be an unnecessary trial has long been recognized as one of the hardships of litigation in our judicial system, but such hardship does not measure up to the inconveniences which would result if piecemeal appeals were permitted. Accordingly, this inconvenience has consistently been held insufficient to justify mandamus.”

The views expressed by this Court are in accord with those expressed by the United States Court of Appeals for the Eighth Circuit in: *Great Northern Railway Company v. Edward T. Hyde*, 236 F.2d 852:

"We do not regard controversies between litigants, and between their counsel as to where a case can most conveniently, fairly, efficiently and economically be tried as 'really extraordinary.'

"We think that, in the interest of an expeditious, efficient and orderly administration of justice controversies about venue should be finally settled and determined at the District Court level."

## VII.

### **THE TRANSFER ORDER OF THE MINNESOTA FEDERAL COURT IS RES JUDICATA AS TO THE PROPER PLACE OF TRIAL.**

(This covers point 7e.)

The same parties appearing in Minnesota Federal Court the same issues were raised and litigants desired an order. The order is final as to the place of trial and should be held to be res judicata. 30 *Am. Jur., Judgments*, Sec. 363.

## VIII.

### **THIS COURT SHOULD DENY MANDAMUS AND PROHIBITION AS BEING IN EFFECT PROCEDURES TO SECURE THE REVIEW OF A NON-APPEALABLE INTERLOCUTORY ORDER.**

(This covers point 9.)

It is well settled by a long line of decisions that the Writs of Certiorari, Mandamus and Prohibition may not be used as a substitute for an authorized appeal and, because the statute permits appeal review of interlocutory orders, except as brought out above review by the writs mentioned, is not permissible.

*Bankers Life and Casualty Co. v. Holland*, 346 U.S. 379, 74 Sup.Ct. 145, 98 L.Ed. 106.

*Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 63 Sup.Ct. 938, 87 L.Ed. 1185.

*U. S. Alkali Export Assn. v. U. S.*, 325 U.S. 196, 65 S.Ct. 1120, 89 L.Ed. 1554.

## IX.

**THIS COURT SHOULD DENY MANDAMUS AND PROHIBITION  
IN THE EXERCISE OF SOUND JUDICIAL DISCRETION.**

(This covers point 10.)

This point is adequately covered by the following decisions :

*Gulf Research v. Harrison* (9 Cir.), 185 F.2d 457, 459,  
supra.

*Great Northern Railway Company v. Hyde* (8 Cir.), 238  
F.2d 852, supra.

**CONCLUSION**

These writs should be denied in the interest of speedy and orderly justice. Judge Carter, in the court below, put his finger on the vice of such litigation when he stated: "This case already has been almost venued to death. While it has some judicial breath of life left it should be tried on the merits."

We think that this sums up the whole matter and states the reasons fully why this Court should deny the writs.

Respectfully submitted,

EUGENE A. RERAT

610 Baker Building

Minneapolis, Minnesota

L. CHARLES GAY

311 California Street

San Francisco, California

*Attorneys for Respondents*

*Of Counsel:*

HARRY H. PETERSON

505 Minnesota Federal Building

Minneapolis, Minnesota



---

IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

GREAT NORTHERN RAILWAY COMPANY, a Corporation,  
*Petitioner,*

vs.

THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALI-  
FORNIA and EDWARD T. HYDE,

*Respondents.*

---

**No. 15,975**

---

PETITIONER'S BRIEF IN SUPPORT OF  
PETITION FOR WRIT OF PROHIBITION  
AND WRIT OF MANDAMUS

---

ANTHONY KANE

L. E. TORINUS

D. E. ENGLE

175 East Fourth Street

St. Paul 1, Minnesota

and

DUNNE, DUNNE & PHELPS

333 Montgomery Street

San Francisco, California

Attorneys for Petitioner

FILE

MAY 5 1951

PAUL P. O'BRIEN

100

100

100

100

100

100

100

100

100

100

100

100

100

100

100

100

100

100

100

100

100

100

100

100

100

100

## INDEX

|   | Page |
|---|------|
| Statement of the Facts .....  | 1    |
| A. The Pleadings and History of the Case.....   | 2    |
| B. Defendant's Affidavits in Support of Motion to<br>Transfer to Seattle, Washington .....  | 4    |
| C. Plaintiff's Affidavits in Opposition to Defendant's<br>Motion to Transfer to Seattle, Washington.....  | 7    |
| Points and Authorities .....  | 8    |
| Argument .....  | 9    |
| I. Prohibition Is the Proper Remedy to Prohibit<br>the United States District Court, Northern Dis-<br>trict of California, from Taking Any Further<br>Action in the Proceeding and Mandamus Is the<br>Proper Remedy to Direct the United States Dis-<br>trict Court, Northern District of California, to<br>Enter an Order Transferring the Action to the<br>United States District Court, Western District<br>of Washington, Northern Division ..... | 9    |
| II. The Denial of the Transfer by the District Court<br>for the Northern District of California to the<br>Western District of Washington Is an Abuse of<br>Discretion and Is Clearly Erroneous .....  | 13   |
| III. The United States District Court, Northern Dis-<br>trict of California, May Transfer the Venue of<br>the Action Under the Provisions of 28 U.S.C.<br>1404(a) to the United States District Court,<br>Western District of Washington, Northern<br>Division, Notwithstanding the Fact the Plaintiff<br>Does Not Reside in Said District and Does Not<br>Voluntarily Submit to Its Jurisdiction.....  | 20   |
| Conclusion .....  | 23   |

## STATUTES CITED

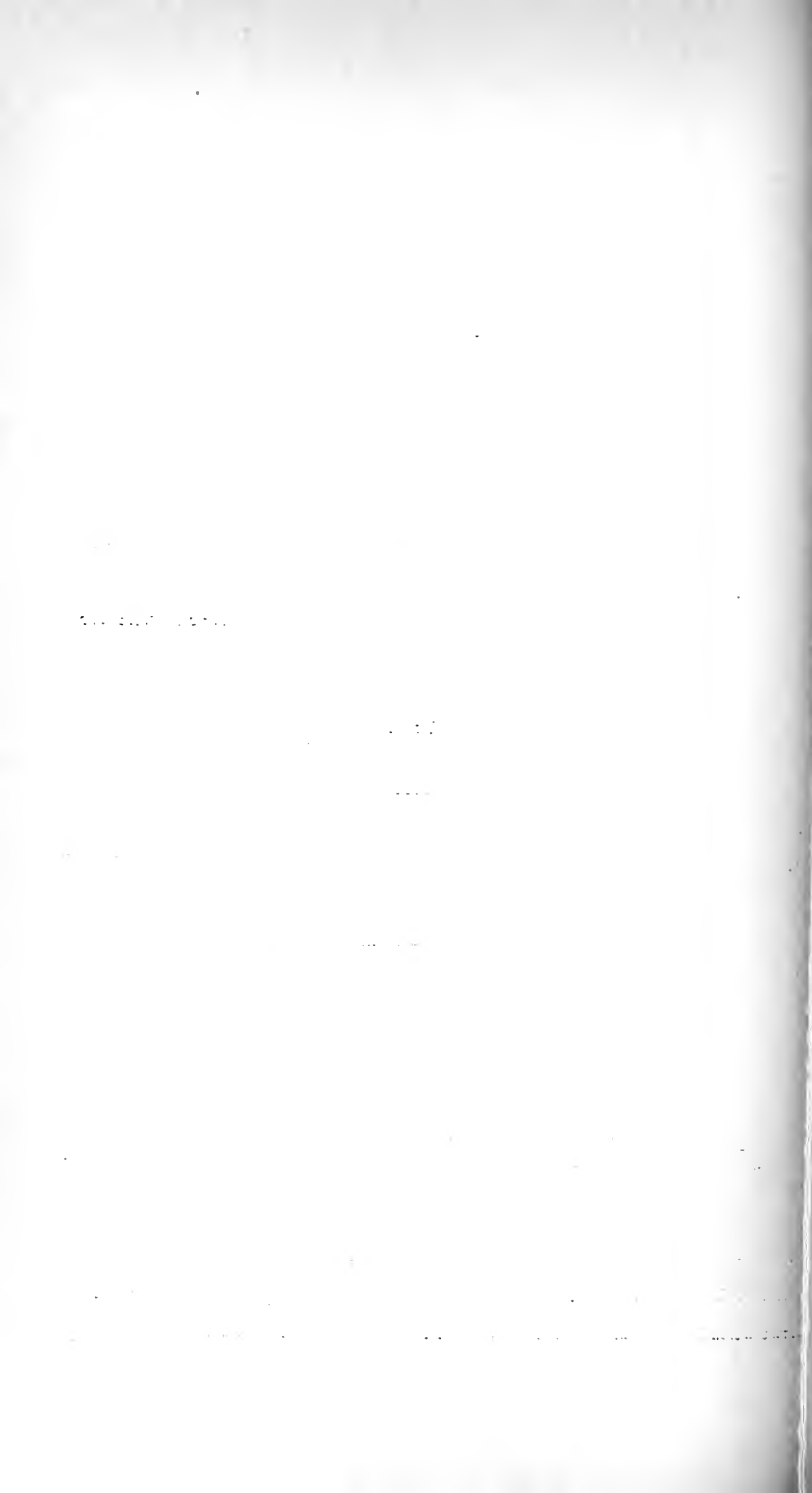
|                         | Page              |
|-------------------------|-------------------|
| 28 U.S.C. 1404(a) ..... | 2, 15, 16, 17, 22 |
| 28 U.S.C. 1651(a) ..... | 10, 20, 21        |

## CASES CITED

|   | Page          |
|---|---------------|
| Andino v. The S.S. Claiborne, 148 F. Supp. 701.....   | 22            |
| Anthony v. RKO Radio Pictures, 103 F. Supp. 56....  | 22            |
| Atlantic Coast Line R. Co. v. Davis, 185 F. (2d) 766...   | 11            |
| Ayala v. A. H. Bull S.S. Company, 148 F. Supp. 703...   | 22            |
| Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 98<br>L. Ed. 106, 74 S. Ct. 145 .....                                   | 10            |
| Barnhart v. John B. Rogers Producing Company, 86<br>F. Supp. 595 .....  | 21            |
| Chicago, R. I. & P. R. Co. v. Igoe, 212 F. (2d) 378,<br>Cert. Denied, 350 U.S. 822, 76 S. Ct. 49,<br>100 L. Ed. 735 ..... | 11            |
| Chicago, R. I. & P. R. Co. v. Igoe, 220 F. (2d) 299,<br>Cert. Denied, 350 U.S. 822, 76 S. Ct. 49,<br>100 L. Ed. 735 ..... | 8, 13, 15, 16 |
| Cound v. Atchison, T. & S. F. Ry. Co., 173 F. 527....   | 20            |
| Davis v. Davis, 96 F. (2d) 512 .....  | 18            |
| Ex parte Collett, 337 U.S. 55, 69 S. Ct. 944, 93 L. Ed.<br>1207 .....   | 20            |
| Ex parte Peru, 318 U.S. 578, 63 S. Ct. 793, 87 L. Ed.<br>1014 .....   | 9             |
| Ford Motor Co. v. Ryan, 182 F. (2d) 329.....  | 8, 11, 13     |
| Gulf Oil Corporation v. Gilbert, 330 U.S. 501,<br>67 S. Ct. 839, 91 L. Ed. 1055.....                                      | 14, 20, 21    |
| Gulf Research and Development Company v. Leahy,<br>193 F. (2d) 302 .....  | 13            |



|  |           |
|--|-----------|
| Hill v. Upper Mississippi Towing Corporation, 141<br>F. Supp. 692 .....                          | 22        |
| Hyde v. Great Northern Railway Company, 238 F. (2d)<br>852 .....                                 | 3, 13     |
| Hyde v. Great Northern Railway Company, 245 F. (2d)<br>537 .....                                 | 3, 19     |
| In Re Josephson, 218 F. (2d) 174 .....   | 22        |
| Jiffy Lubricator, Inc. v. Stewart-Warner Company,<br>177 F. (2d) 360 .....                       | 12        |
| LaBuy v. Howes Leather Company, 352 U.S. 249,<br>77 S. Ct. 309, 1 L. Ed. (2d) 290.....           | 8, 10     |
| Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485,<br>20 S. Ct. 708, 44 L. Ed. 856 .....         | 17        |
| Messenger v. Anderson, 225 U.S. 436, 32 S. Ct. 739,<br>56 L. Ed. 1152 .....                      | 18        |
| Nicol v. Koscinski, 188 F. (2d) 537 .....  | 8, 11, 13 |
| Paramount Pictures v. Rodney, 186 F. (2d) 111.....   | 11        |
| Plattner Implement Co. v. International Harvester Co.,<br>133 F. 376 .....                       | 18        |
| Shapiro v. Bonanza Hotel Co., 185 F. (2d) 777.....   | 8, 12     |
| Southern R. Co. v. Clift, 260 U.S. 316, 43 S. Ct. 126,<br>67 L. Ed. 283 .....                    | 18        |
| U. S. v. Gypsum Company, 333 U.S. 364, 68 S. Ct. 525,<br>92 L. Ed. 746 .....                     | 14        |
| Universal Oil Products Co. v. Standard Oil Co., 6 F.<br>Supp. 37 .....                           | 18        |
| Wiren v. Laws, 194 F. (2d) 873, Cert. Denied, 346 U.S.<br>938, 74 S. Ct. 378, 98 L. Ed. 426..... | 8, 12     |



IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

GREAT NORTHERN RAILWAY COMPANY, a Corporation,  
*Petitioner,*

vs.

THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALI-  
FORNIA and EDWARD T. HYDE,

*Respondents.*

---

No. 15975

---

PETITIONER'S BRIEF IN SUPPORT OF  
PETITION FOR WRIT OF PROHIBITION  
AND WRIT OF MANDAMUS

---

STATEMENT OF THE FACTS

The petitioner (hereinafter referred to as defendant) by this proceeding seeks an order prohibiting the United States District Court for the Northern District of California from taking any action in the case entitled Edward T. Hyde, plaintiff v. Great Northern Railway Company, a Corporation, defendant, Civil Action No. 36948, and an order directing

the United States District Court for the Northern District of California to transfer said case pursuant to 28 U.S.C. 1404(a) to the United States District Court, Western District of Washington, Northern Division, sitting at Seattle, Washington.

### A. The Pleadings and History of the Case.

A concise history of the pertinent facts of the case are as follows:

The plaintiff's complaint was originally filed in the United States District Court, District of Minnesota, Third Division, on February 23, 1956. The complaint states an action against defendant under the provisions of 45 U.S.C., Sections 51-60, commonly known as the Federal Employers Liability Act. The cause of action arose out of an accident which occurred November 5, 1955, in Seattle, Washington, while the plaintiff was working as a switch foreman for the defendant. The defendant served and filed its answer March 16, 1956.

The defendant served and filed a notice of motion and supporting affidavits for an order of the United States District Court, District of Minnesota, Third Division, transferring the case under the provisions of 28 U.S.C. 1404(a) to the United States District Court, Western District of Washington, Northern Division, for trial at Seattle. The plaintiff, on July 12, 1956, served and filed a notice of alternative motion that the plaintiff would oppose the transfer of the case from the District of Minnesota and, in the alternative, moved the court, in the event it determined that the District of Minnesota was not a proper venue, to transfer the case to the United States District Court, Northern District of California, Southern Division, sitting at San Francisco. The United

States District Court, District of Minnesota, Third Division, granted the plaintiff's alternative motion on August 2, 1956.

Defendant petitioned the United States Court of Appeals for the Eighth Circuit August 6, 1956, for alternative writs of prohibition and mandamus, which were subsequently issued, directing the plaintiff and the United States District Court for the District of Minnesota to show cause why said writs should not be made absolute. The returns to the alternative writs were filed and the matter was heard before the court, which filed its opinion and judgment December 18, 1956 (*Hyde v. Great Northern Railway Company*, 238 F. (2d) 852). The United States Court of Appeals for the Eighth Circuit denied defendant's application for the writs "upon the sole ground that the transfer order complained of is not reviewable by prohibition, mandamus or otherwise" and the court further held:

"\* \* \* we believe that there was no adequate factual or legal basis for the transfer. If the order transferring the case were subject to review for an erroneous exercise of a sound discretion, we would not hesitate to reverse the order and direct the District Court to transfer the case to Seattle, \* \* \*."

A petition for rehearing was filed in the United States Court of Appeals for the Eighth Circuit and was granted. The court filed its opinion and judgment on rehearing June 27, 1957 (*Hyde v. Great Northern Railway Company*, 245 F. (2d) 537) and affirmed its original judgment. The court said in this opinion:

"\* \* \* Here we have an erroneous exercise of judicial discretion because the factual situation did not warrant the transfer of the case to the Northern District of California under Sec. 1404(a).

“\* \* \*

“Here the District Judge has transferred a case for trial to a district in which it could have been brought, but to which, in our opinion, it could not properly have been transferred in view of the surrounding circumstances.”

The defendant petitioned the United States Supreme Court for a writ of certiorari to review the decision of the Court of Appeals for the Eighth Circuit pursuant to a clear mandate from that court that such action be taken. The United States Supreme Court denied the petition for certiorari November 12, 1957.

The action was transferred to the United States District Court, Northern District of California, Southern Division, November 28, 1957. On January 6, 1958, defendant filed a notice of motion and supporting affidavits in the United States District Court, Northern District of California, Southern Division, for an order transferring the venue of the action to the United States District Court, Western District of Washington, Northern Division, for trial at Seattle. The United States District Court for the Northern District of California, Southern Division, filed its order and memorandum March 17, 1958, denying defendant's motion.

The review of this order is the subject matter of these prohibition and mandamus proceedings.

## **B. Defendant's Affidavits in Support of Motion to Transfer to Seattle, Washington.**

Defendant's motion to transfer to Seattle was supported by several affidavits which set forth the following facts:

1. The accident occurred at Seattle, Washington, on November 5, 1955 (R. 16B).

2. The plaintiff at the time the accident occurred was a resident of Seattle (R. 16B).

3. Seattle is approximately 904 miles from San Francisco (R. 16B).

4. Nineteen persons having personal knowledge of the facts material to the action reside in Seattle, Washington (R. 16B - 23B).

5. Each of the nineteen persons will be necessary and material at the trial of the case and their testimony would be relevant to the issues involved (R. 23B).

6. That the testimony of each of the nineteen persons in deposition form would be extremely unsatisfactory, and that if their testimony would be produced in deposition form at the trial of this case at San Francisco the rights of the defendant would be seriously prejudiced in the eyes of the jury (R. 27B).

7. Each of the nineteen persons will be required to spend two and one-half additional days and three additional nights in additional travel time if the case were tried at San Francisco rather than Seattle (R. 23B).

8. Each of the nineteen persons would be required to spend an additional six days attending the trial at San Francisco rather than Seattle in additional travel time (R. 23B).

9. The defendant would be required to expend \$4,057.10 additional expense if the case were tried in San Francisco rather than Seattle (R. 25B).

10. That seventeen of the necessary persons required at the trial are employees of the defendant (R. 25B).

11. Six medical specialists who treated the plaintiff from the date of the accident until January 30, 1956, reside and

practice medicine in the city of Seattle (R. 17B, 18B, 19B).

12. If the case were tried at a location other than Seattle, the court and jury would be deprived of an opportunity to view the scene where the accident occurred (R. 29B).

13. That if the case were transferred to Seattle, Washington, for trial, the defendant would arrange to have the case tried by its regular salaried company attorneys residing in the city of Seattle in contrast to the expense of having the action tried by a private firm of attorneys at San Francisco (R. 28B).

14. The spring term of court for the trial of jury cases at Seattle, Washington, will be held commencing the first Tuesday in May, 1958 (R. 30B).

15. Five of the six medical specialists who treated the plaintiff at Seattle, Washington, refuse to voluntarily appear for the trial of the case at San Francisco, and the sixth medical specialist states that it would be very inconvenient for him to attend the trial at San Francisco (R. 38B - 49B).

16. The three medical specialists who treated the plaintiff during his confinement in the Veterans Administration Hospital at Long Beach, California, refuse to voluntarily appear for the trial of this case at San Francisco (R. 50B - 55B).

17. There is daily nonstop air flights between Los Angeles and Seattle taking approximately three hours and forty-five minutes (R. 83B).

18. The plaintiff was confined in the Veterans Administration Hospital at Long Beach, California, from September 1, 1956, until April 10, 1957, and September 14, 1957, until September 18, 1957 (R. 85B).

19. The plaintiff is physically able to travel to Seattle, Washington, from Long Beach, California, in the opinion



of the medical specialists who treated the plaintiff at the Veterans Administration Hospital at Long Beach, California (R. 87B).

20. The necessary witnesses at the trial of this action residing in Seattle, Washington, and Long Beach, California, including the medical specialists who treated the plaintiff in these cities, are not subject to subpoena of the United States District Court for the Northern District of California, Southern Division.

### C. Plaintiff's Affidavits in Opposition to Defendant's Motion to Transfer to Seattle, Washington.

Plaintiff's objections to the transfer to the United States District Court, Western District of Washington, Northern Division, sitting at Seattle, are:

1. The plaintiff is paralyzed from the ninth and tenth dorsal vertebra down (R. 61B).
2. Dr. Wolfgang W. Klemperer, one of six medical specialists who treated the plaintiff at Seattle, would be willing to go to San Francisco and testify at the trial of the case (R. 75B).
3. The plaintiff is presently a resident of a suburb of Long Beach, California (R. 63B).
4. It is difficult for the plaintiff to travel.

## POINTS AND AUTHORITIES

- I. Prohibition Is the Proper Remedy to Prohibit the United States District Court, Northern District of California, from Taking Any Further Action in the Proceeding and Mandamus Is the Proper Remedy to Direct the United States District Court, Northern District of California, to Enter an Order Transferring the Action to the United States District Court, Western District of Washington, Northern Division.

*LaBuy v. Howes Leather Company*, 352 U.S. 249, 77 S.Ct. 309, 1 L. Ed. (2) 290.

*Shapiro v. Bonanza Hotel Co.* (9 Cir.), 185 F. (2d) 777.

*Chicago, R. I. & P. R. Co. v. Igoe* (7 Cir.), 212 F. (2d) 378, Cert. Denied, 350 U.S. 822, 76 S.Ct. 49, 100 L. Ed. 735.

*Ford Motor Co. v. Ryan* (2 Cir.), 182 F. (2d) 329.

*Wiren v. Laws* (D.C.), 194 F. (2d) 873, Cert. Denied, 346 U.S. 938, 74 S.Ct. 378, 98 L. Ed. 426.

- II. The Denial of the United States District Court, Northern District of California, to Transfer the Venue of the Action to the United States District Court, Western District of Washington, Northern Division, Is an Abuse of Judicial Discretion and Is Clearly Erroneous.

*Chicago, R. I. & P. R. Co. v. Igoe* (7 Cir.), 220 F. (2d) 299, Cert. Denied, 350 U.S. 822, 76 S.Ct. 49, 100 L. Ed. 735.

*Nicol v. Koscinski* (6 Cir.), 188 F. (2d) 537.

- III. The United States District Court, Northern District of California, May Transfer the Venue of the Action Under

the Provisions of 28 U.S.C. 1404(a) to the United States District Court, Western District of Washington, Northern Division, Notwithstanding the Fact the Plaintiff Does Not Reside in Said District and Does Not Voluntarily Submit to Its Jurisdiction.

## ARGUMENT

### I.

**Prohibition Is the Proper Remedy to Prohibit the United States District Court, Northern District of California, from Taking Any Further Action in the Proceeding and Mandamus Is the Proper Remedy to Direct the United States District Court, Northern District of California, to Enter an Order Transferring the Action to the United States District Court, Western District of Washington, Northern Division.**

The authority of the Courts of Appeals to issue the writ of prohibition and writ of mandamus is found in Section 1651(a) of the Judicial Code, which provides that all courts established by act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. The historical use of writs of mandamus and prohibition directed by an appellate court to an inferior court has been to exert the revisory appellate power over the inferior court. The writs thus afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction. *Ex parte Peru* (1943), 318 U.S. 578, 583, 63 S. Ct. 793, 87 L. Ed. 1014. A further use of the writs, both at com-

mon law and in the federal courts, has been to compel an inferior court to exercise its authority when it is its duty to do so. *Bankers Life & Cas. Co. v. Holland* (1953), 346 U.S. 379, 98 L. Ed. 106, 74 S. Ct. 145.

The United States Supreme Court, in its recent decision in *LaBuy v. Howes Leather Company* (1957), 352 U.S. 249, 77 S. Ct. 309, 1 L. Ed. (2) 290, again reiterated the power of Courts of Appeals to issue writs of prohibition and mandamus under the All Writs Act, 28 U.S.C. 1651(a). The Supreme Court held that Courts of Appeals have the discretionary power to issue writs of mandamus to compel a District Court to vacate a nonappealable interlocutory order.

The *LaBuy* case arose from litigation involving two anti-trust actions instituted in the Federal District Court. The District Court, contrary to the desires of the parties, entered its order under Rule 53(b) of the Federal Rules of Civil Procedure referring the case for trial before a master. The matter came before the Court of Appeals for the Seventh Circuit on petitions seeking writs of mandamus directing the court to vacate the nonappealable interlocutory order of reference. The Court of Appeals granted the writs and vacated the discretionary order notwithstanding the respondent's contention that the extraordinary writs under Section 1651(a) could not be used as a device for review of interlocutory orders in advance of final decision. The Supreme Court granted certiorari and affirmed the decision of the Court of Appeals for the Seventh Circuit.

The Supreme Court in its decision stated on page 255:

"\* \* \* The question of naked power [of the Courts of Appeals to issue writs of mandamus to review interlocutory orders] has long been settled by this Court. As late as *Roche v. Evaporated Milk Association*, 319 U.S. 21

(1943), Mr. Chief Justice Stone reviewed the decisions and, in considering the power of Courts of Appeals to issue writs of mandamus, the Court held that 'the common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court.' *Id.*, at 25. The recodification of the All Writs Act in 1948, which consolidated old §§ 342 and 377 into the present § 1651(a), did not affect the power of the Courts of Appeals to issue writs of mandamus in aid of jurisdiction. See *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 382-383 (1953)."

The Court further stated on page 259:

"We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system. The All Writs Act confers on the Courts of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here."

Courts of Appeals for seven circuits have passed upon the instant question and have specifically held that prohibition and mandamus will lie to review an order entered under Section 1404(a). These decisions are in accord with the Supreme Court's opinion in the *LaBuy* case although rendered previous to that decision:

*Ford Motor Co. v. Ryan* (2 Cir.), 182 F. (2) 329.

*Paramount Pictures v. Rodney* (3 Cir.), 186 F. (2) 111.

*Atlantic Coast Line R. Co. v. Davis* (5 Cir.), 185 F. (2) 766.

*Nicol v. Koscinski* (6 Cir.), 188 F. (2) 537.

*Chicago, R. I. & P. R. Co. v. Igoe* (7 Cir.), 212 F. (2) 378, Cert. Denied, 350 U.S. 822, 76 S.Ct. 49, 100 L. Ed. 735.

*Wiren v. Laws* (D.C.), 194 F. (2d) 873, Cert. Denied, 346 U.S. 938, 74 S.Ct. 378, 98 L. Ed. 426.

In addition to the above, this Court has held that it has the power to issue writs of prohibition and mandamus to review an order entered under Section 1404(a). *Shapiro v. Bonanza Hotel* (9 Cir.), 185 F. (2d) 777.

In that case the plaintiff sought review of an order denying a motion for a change of venue made under Section 1404(a) from the District Court for the District of Nevada to the District Court for the Southern District of California. The court treated the appeal as though it were a petition for a writ of mandamus. The court held that the writ of mandamus is an extraordinary remedy to be applied with caution, but that sufficient grounds existed in the case to issue the writ if it clearly appears that the District Court was in error.

Clearly prohibition and mandamus is the proper procedure since it is the only procedure to review the District Court's denial of defendant's motion to transfer the venue of this action to Seattle, Washington, under Section 1404(a). The injury to the defendant cannot be corrected by appeal from the order complained of since the order is interlocutory and not appealable. *Jiffy Lubricator, Inc. v. Stewart-Warner Company* (4 Cir.), 177 F. (2d) 360. The harmful effects of an erroneous trial court's determination of transfer given without immediate review cannot be rectified on an appeal from final judgment because it would then be necessary to show prejudicial error, an impossible task. Defendant will not be able to show that a different result would have been reached had the case been tried in the proper jurisdiction, to-wit, the Western District of Washington. Nor can the defendant recover the increased costs of trying its case in an

inconvenient form even though it wins on the merits since such damages would be the consequence of a judicial act.

*Ford Motor Co. v. Ryan, supra.*

Mandamus is the only remedy whereby the statutory factors providing for the convenience of witnesses can be protected. Upon appeal from an adverse final judgment below, the inconvenience of the witnesses would be a moot question. The factors, convenience of parties and witnesses, must in their nature be reviewed before trial if at all. *Gulf Research and Development Company v. Leahy* (3 Cir.), 193 F. (2) 302, 305. Prohibition and mandamus are the proper and only remedies in the case at bar because appeal is clearly an inadequate remedy. *Hyde v. Great Northern Railway Company*, 238 F. (2) 852, 855.

## II.

**The Denial of the Transfer by the District Court for the Northern District of California to the Western District of Washington Is an Abuse of Discretion and Is Clearly Erroneous.**

The Courts of Appeals who have reviewed an order for transfer by way of extraordinary writs under the All Writs Act have universally held that the issue on review is whether the District Court abused its discretion in ordering or failing to order the transfer. Was the order under review "so 'clearly erroneous' as to amount to an abuse of his discretion?" *Chicago, R. I. & P. R. Co. v. Igoe* (7 Cir.), 220 F. (2d) 299, Cert. Denied, 350 U.S. 822, 76 S.Ct. 49, 100 L. Ed. 735.

In the Sixth Circuit this rule was established in *Nicol v. Koscinski, supra*, where the court held on page 538:

“Determination as to the greater convenience or inconvenience must rest within the sound judicial discretion of the district judge to whom the petition for change of venue is addressed, and his decision should not be set aside unless there is apparent an abuse of discretion.”

The Supreme Court of the United States has held the scope of review of the order applying the doctrine of forum non conveniens was confined to whether or not the District Court abused its discretion. *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, 512, 67 S.Ct. 839, 91 L. Ed. 1055.

When the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been committed, a finding is “clearly erroneous” although there is some evidence to support it. *U. S. v. Gypsum Company*, 333 U. S. 364, 395, 68 S.Ct. 525, 92 L. Ed. 746.

In *Gulf Oil Corporation v. Gilbert*, *supra*, the Supreme Court, in reviewing an order under the doctrine of forum non conveniens, related the factors or criteria to be taken into consideration in determining whether or not the order of the District Judge was clearly erroneous and an abuse of judicial discretion. The court stated on pages 508 and 509:

“Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case *easy, expeditious* and *inexpensive*. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, ‘vex,’ ‘harass,’ or ‘oppress’ the defendant by inflicting



upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

"Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home." (Emphasis supplied.)

Factors under Section 1404(a) which demonstrate that a transfer should be made are concisely stated in *Chicago, R. I. & P. R. Co. v. Igoe, supra*, on page 304:

"\* \* \* convenience of witnesses of both plaintiff and defendant; the ease of access to sources of proof; the availability of compulsory process to compel the attendance of unwilling witnesses; the smaller amount of expense required for willing witnesses; the availability of a view of the premises; the congestion of the District Court calendar in the \* \* \* [district where the action was commenced]; that no controverted issue of fact depends upon any event that occurred in the \* \* \* [district where the action was commenced]; and the burden of a jury trial should not be imposed upon the \* \* \* [district where the action was commenced], an area which has no relation to the litigation."

There is no dispute concerning the facts on which defendant's motion is based. There is no person having knowl-

edge of any relevant facts concerning the happening of this accident who is located in the Northern District of California. All of the persons who will be necessary at the trial of this case reside in the city of Seattle, Washington, except three doctors who treated the plaintiff at Long Beach, California, who will not voluntarily appear for the trial of this case at San Francisco or Seattle. These three doctors are not subject to subpoena. All of the records which have any bearing on this lawsuit are located at Seattle. If this case is tried at San Francisco rather than Seattle, all of the witnesses from Seattle will be compelled to spend two and one-half additional days in additional travel time from Seattle and return and will be compelled to spend six additional days attending the trial of the case. Plaintiff's attorney conceded at the argument of the motion before Judge Carter that the plaintiff presently is physically able to travel to Seattle, Washington, for the trial of this case. The additional expense to the defendant if the case is tried at San Francisco is \$4,057.10. The above facts clearly point out that the failure to transfer the action to the Western District of Washington was erroneous and an abuse of discretion of the United States District Court for the Northern District of California.

In *Chicago, R. I. & P. R. Co. v. Igoe, supra*, the court held under facts similar to the instant case that the District Court abused its discretion and was clearly erroneous in failing to order a transfer under Section 1404(a).

Abuse of discretion becomes evident also by reviewing Judge Carter's memorandum wherein he states:

"Regardless of what the decision of this Court would have been had defendant's motion been made to this Court in the first instance, considerations of comity require that this Court should not review the decision made by the Minnesota court."

It is evident that Judge Carter failed to consider the factors enumerated in Section 1404(a) in considering defendant's motion for a transfer to Seattle and arbitrarily held that judicial comity and the rule of the "law of the case" required denial of defendant's motion.

Judicial comity and the rule of the "law of the case" did not prohibit the United States District Court, Northern District of California, from exercising its judicial power and discretion to transfer the action to Seattle, Washington, under Section 1404(a). Judicial comity is a principle whereby the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation but out of deference and respect. It is a courtesy and a gesture of good will. The United States Supreme Court in *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 20 S.Ct. 708, 44 L. Ed. 856, states the rule of judicial comity in the federal courts on page 488:

"Comity is not a rule of law, but one of practice, convenience and expediency. \* \* \* its obligation is not imperative. \* \* \* Comity persuades; but it does not command. \* \* \* It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right. In doing so, the judge is bound to determine them according to his own convictions. If he be clear in those convictions, he should follow them. It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views that comity comes in play and suggests an uniformity of ruling to avoid confusion, \* \* \*. It demands of no one that he shall abdicate his individual judgment, but only that deference shall be paid to the judgments of other coordinate tribunals. Clearly it applies only to questions which have been actually decided, and which arose under the same facts."

The "law of the case" is a discretionary rule of practice. *Southern R. Co. v. Clift*, 260 U.S. 316, 43 S.Ct. 126, 67 L. Ed. 283. Mr. Justice Holmes in *Messenger v. Anderson*, 225 U.S. 436, 444, 32 S.Ct. 739, 56 L. Ed. 1152, defined the rule as follows:

"In the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power."

It should further be pointed out that the "law of the case" rule has three exceptions, and when one or more of these exceptions is present the rule will not be followed. These exceptions are:

1. When there is a certainty the earlier ruling is erroneous.
2. When the succeeding judge concludes that the court has no jurisdiction.
3. When the application of the rule would work manifest injustice.

See *Davis v. Davis* (D.C.), 96 F. (2d) 512; *Universal Oil Products Co. v. Standard Oil Co.* (W.D. Mo.), 6 F. Supp. 37; *Plattner Implement Co. v. International Harvester Co.* (8 Cir.), 133 F. 376. The court stated on page 378 of the *International Harvester Co. case, supra*, in regard to the rule of comity and the "law of the case":

"\* \* \* by its terms [the rule] it permits the 'most cogent reasons', such as a certainty that a previous ruling was erroneous, that no conflict would arise and no injustice would result from disregarding it, to present exceptions to it."

Judge Carter, in denying defendant's motion to transfer the venue of this action to Seattle, did so on the basis of judicial comity and the rule of the "law of the case." In so doing the court failed "to dispose of the case according to the law and facts" and failed to follow its "own convictions" and "abdicated [its] individual judgment" contrary to the mandate of the United States Supreme Court in the *Mast case*. The court failed to consider the obvious error of the Minnesota District Court in its previous ruling and the manifest injustice of that rule on the defendant. See *Hyde v. Great Northern Railway Company, supra*.

The abdication of the court's individual judgment to a previous erroneous and unjust ruling and the failure to consider defendant's motion on the merits under the criteria set forth in Section 1404(a) was clearly erroneous and an abuse of judicial discretion. As indicated by this court at the oral argument on defendant's motion for leave to file its petition for writs of prohibition and mandamus in this action, Judge Carter was required to view defendant's transfer motion in the same prospective as if the motion had been originally made to that court.

## III.

The United States District Court, Northern District of California, May Transfer the Venue of the Action Under the Provisions of 28 U.S.C. 1404(a) to the United States District Court, Western District of Washington, Northern Division, Notwithstanding the Fact the Plaintiff Does Not Reside in Said District and Does Not Voluntarily Submit to Its Jurisdiction.

The Federal Employers Liability Act provides that an action thereunder may, be brought where the plaintiff resides or the action arose or where the defendant is doing business when the action is commenced. These liberal venue provisions were inserted in 1910 (36 Stat. 291) to relieve plaintiffs who were previously unable to bring an action except in the often distant domicile of the defendant. *Cound v. Atchison, T. & S. F. Ry. Co.*, 173 F. 527. The venue provisions were designed for the benefit of the plaintiff. In 1948 Section 1404(a) was enacted and in 1949 the United States Supreme Court upheld the application of the section to actions under the Federal Employers Liability Act. *Ex parte Collett*, 337 U.S. 55, 69 S.Ct. 944, 93 L. Ed. 1207. Prior to the enactment of Section 1404(a) the United States Supreme Court adopted the doctrine of forum non conveniens. *Gulf Oil Corporation v. Gilbert*, *supra*. Section 1404(a) is the statutory enactment of this doctrine.

The liberal venue provisions afforded plaintiffs under the Federal Employers Liability Act from 1910 until the adoption of forum non conveniens in the federal courts in 1947 resulted in forum shopping on a large scale by plaintiffs in

search, not of more convenient adjudication, but of more generous verdicts, and courts in several larger cities found their dockets swollen by actions which occurred in far distant forums. (64 Harvard Law Review 1347, 1353) The plaintiffs, by choice of an inconvenient forum, would vex, harass and oppress the defendant by inflicting upon him expense or trouble not necessary to the plaintiff's own right to prosecute his remedy. *Gulf Oil Corporation v. Gilbert, supra*. The purpose in the adoption of forum non conveniens in the federal courts and its statutory counterpart, Section 1404(a), was clearly set forth in *Barnhart v. John B. Rogers Producing Company* (N. D. Ohio W. D.), 86 F. Supp. 595, 599:

"It appears to the court that the motivating factors for the enactment of Section 1404(a) was to afford relief to the defendant by placing him on a footing of equality with the plaintiff in the selection of a forum for the trial of the case."

In view of the historical background of Section 1404(a), and the purpose for which it was enacted, the words "where it might have been brought" by necessity must connote a jurisdiction where the action may have been commenced in the first instance by the plaintiff. The mere fact that the plaintiff in the instant case is not a resident of the state of Washington and the judicial district of Washington does not preclude the United States District Court for the Northern District of California from transferring this action to that district. If the above-quoted provisions of Section 1404(a) were to be given a restricted meaning in the sense that an action could not be transferred to a division or district in which the plaintiff was not subject to the district court's jurisdiction, it would result in a district court only being empowered to transfer an action on defendant's motion to a

division or district in which the plaintiff was a resident. In those situations in which the action was initially commenced in the jurisdiction where the plaintiff resided no transfer would be available to the defendant under Section 1404(a). Such a restricted view of Section 1404(a) would render the section completely ineffective for the purpose for which it was enacted. "Might have been brought" refers to potential jurisdiction by necessity.

The following are citations of cases where various federal courts have transferred actions to other federal courts in jurisdictions where the plaintiff was not a resident and therefore was not subject to the jurisdiction of the court except as a result of the transfer order. In such cases the jurisdiction of the transferee court over the plaintiff is acquired through the transfer order and the fact that the transferor court had jurisdiction of the plaintiff at the time the transfer order was entered.

*In Re Josephson* (1 Cir.), 218 F. (2d) 174.

*Anthony v. RKO Radio Pictures*, 103 F. Supp. 56.

*Andino v. The S. S. Claiborne*, 148 F. Supp. 701.

*Ayala v. A. H. Bull S. S. Company*, 148 F. Supp. 703.

*Hill v. Upper Mississippi Towing Corporation*, 141 F. Supp. 692.



## CONCLUSION

It is respectfully submitted that the petition for a writ of prohibition be granted prohibiting the United States District Court, Northern District of California, from taking any further action in the proceeding, and that a writ of mandamus be issued directing the United States District Court, Northern District of California to set aside its order dated March 17, 1958, and to enter an order transferring the venue of the action to the United States District Court, Western District of Washington, Northern Division, sitting at Seattle.

Respectfully submitted,

ANTHONY KANE

L. E. TORINUS

D. E. ENGLE

175 East Fourth Street

St. Paul 1, Minnesota

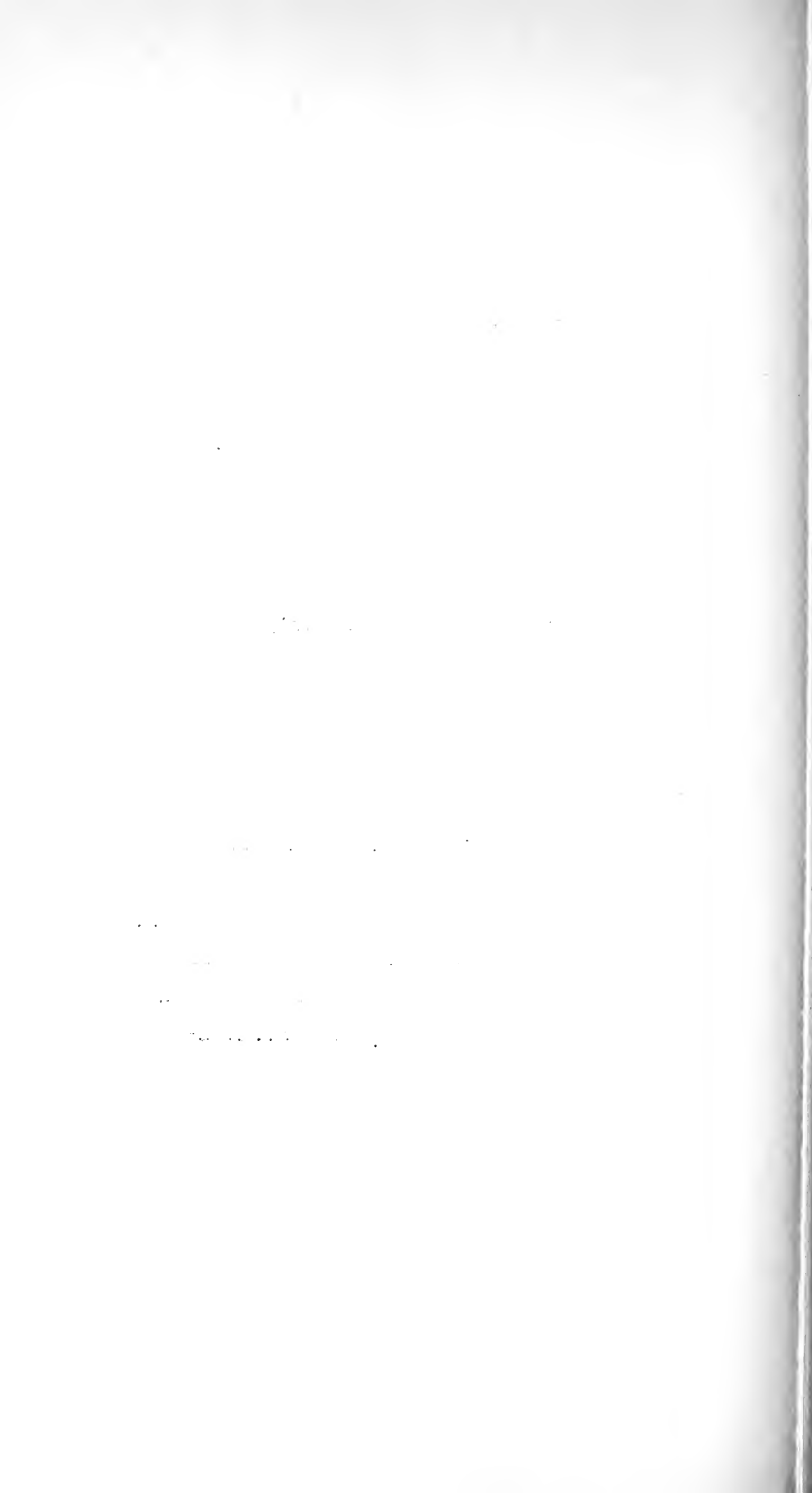
and

DUNNE, DUNNE & PHELPS

333 Montgomery Street

San Francisco, California

Attorneys for Petitioner



No. 15977

---

**United States  
Court of Appeals**  
for the Ninth Circuit

---

WILLIAM ALEX KARIAKIN,  
Appellant,  
vs.  
UNITED STATES OF AMERICA,  
Appellee.

---

**Transcript of Record**

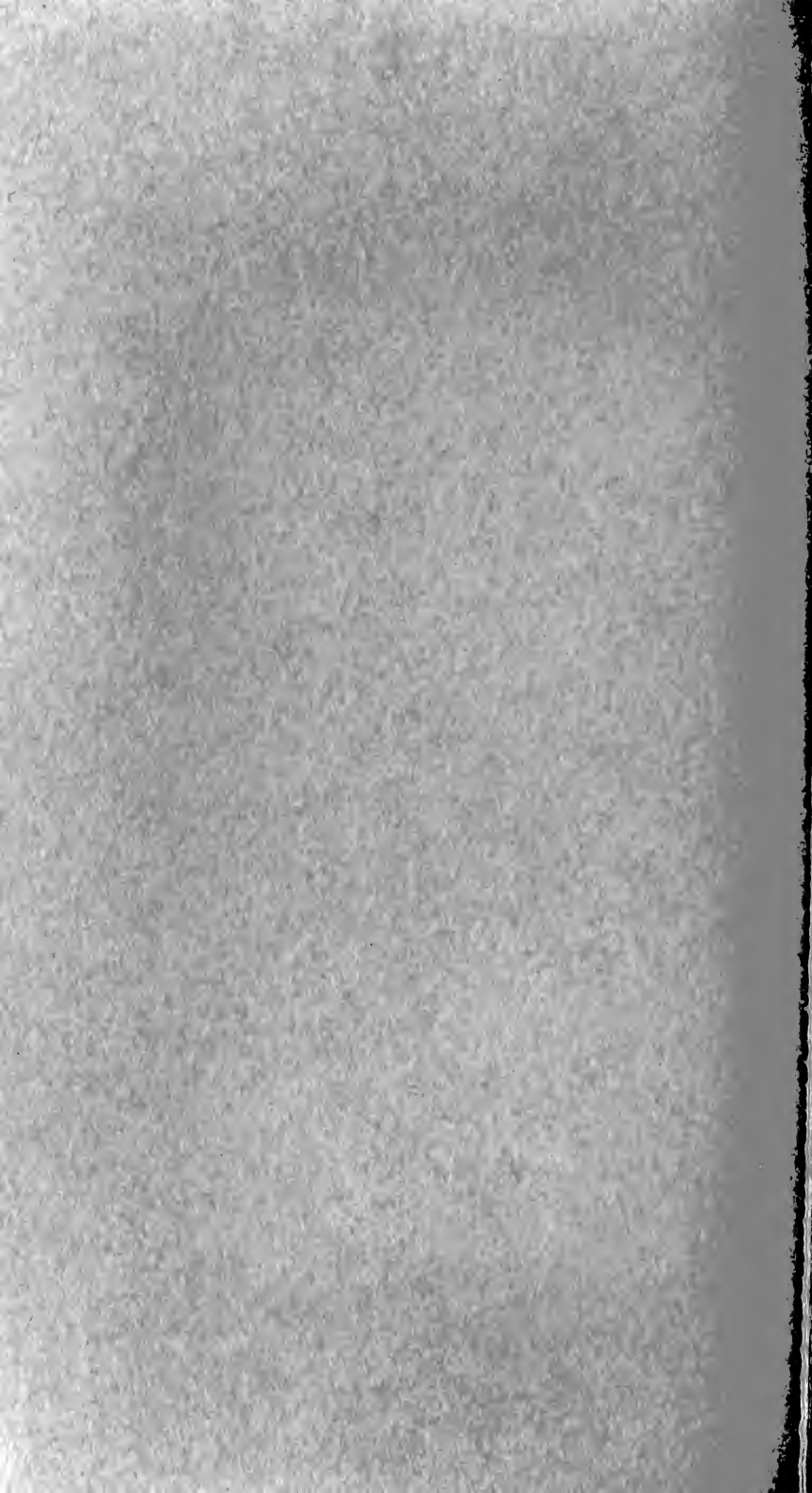
---

Appeal from the United States District Court for the  
Southern District of California  
Central Division

**FILE**

MAY 20 1958

PAUL P. O'BRIEN, G



No. 15977

---

**United States  
Court of Appeals**  
for the Ninth Circuit

---

**WILLIAM ALEX KARIAKIN,**  
Appellant,  
vs.  
**UNITED STATES OF AMERICA,**  
Appellee.

---

**Transcript of Record**

---

**Appeal from the United States District Court for the  
Southern District of California  
Central Division**

1000

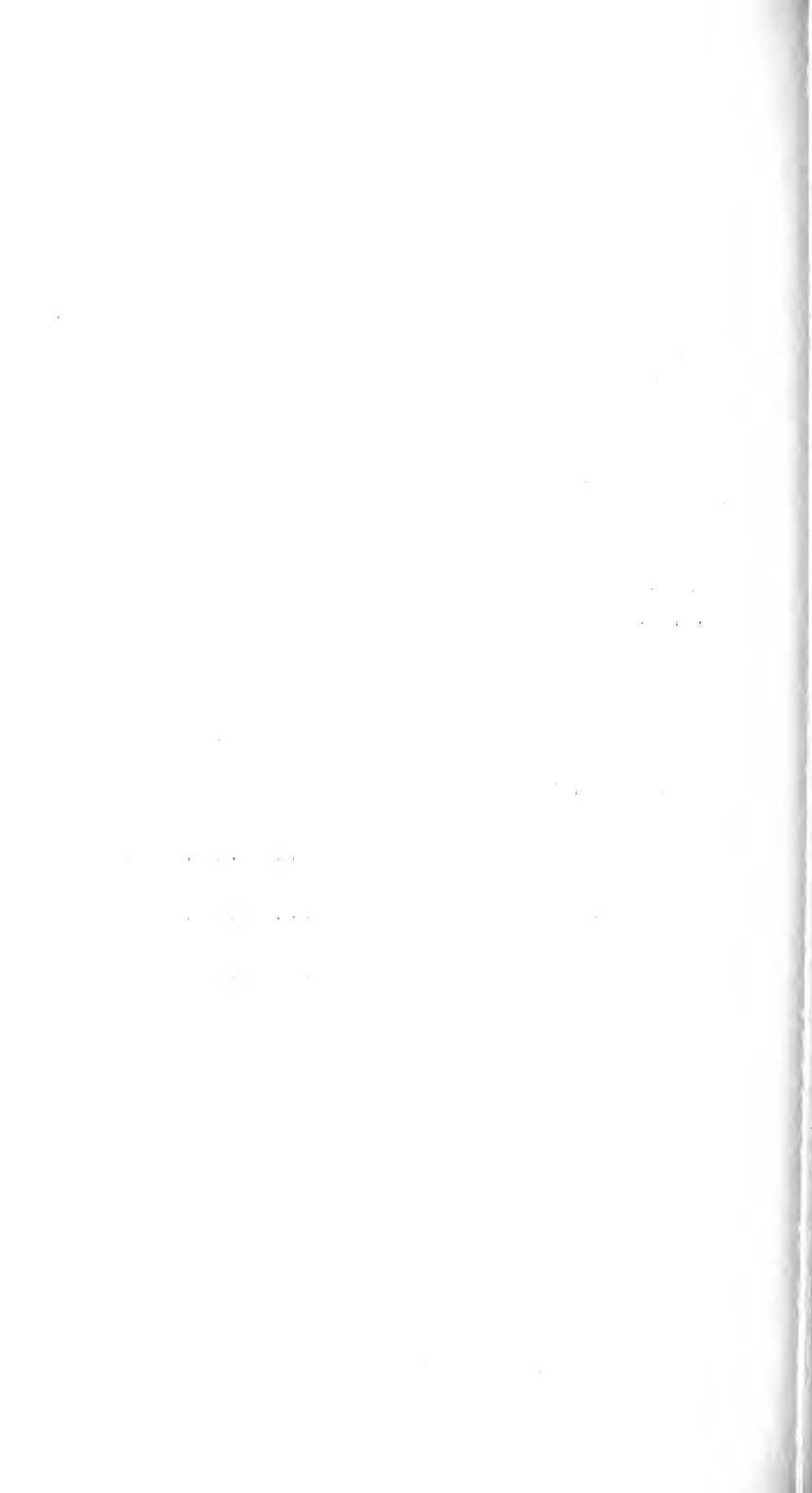
1000

## INDEX

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

|   | PAGE |
|---|------|
| Application for Order Extending Time to File<br>and Docket Record on Appeal ..... | 7    |
| Order Re .....  | 8    |
| Attorneys, Names and Addresses of .....   | 1    |
| Certificate by Clerk .....  | 8    |
| Indictment .....  | 3    |
| Judgment and Commitment .....   | 4    |
| Notice of Appeal .....  | 6    |
| Statement of Docket Entries .....   | 9    |
| Statement of Points on Appeal .....   | 11   |





## NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

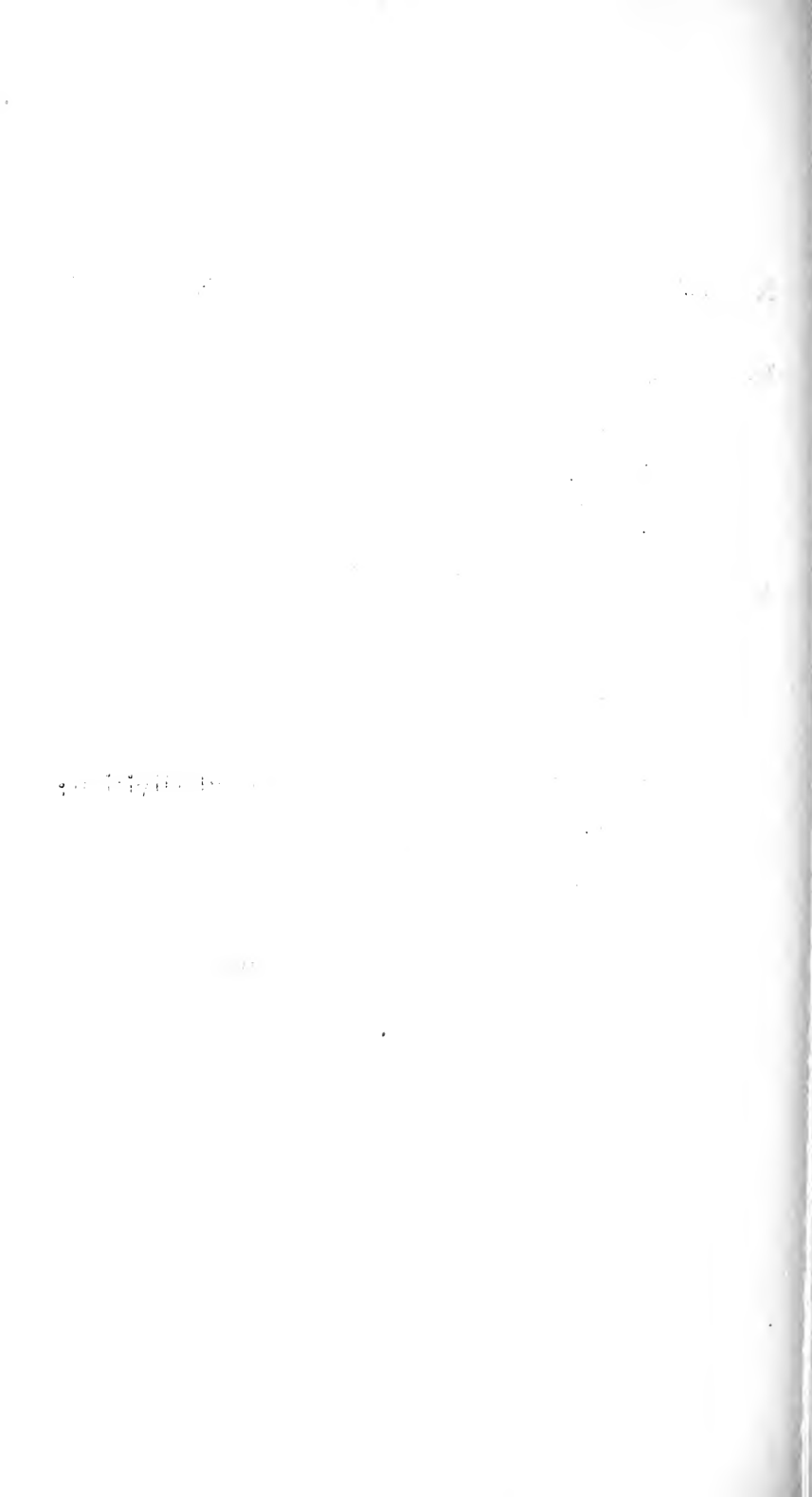
LIONEL RICHMAN,  
1250 Wilshire Boulevard,  
Los Angeles 17, California.

For Appellee:

LAUGHLIN E. WATERS,  
United States Attorney;

LLOYD F. DUNN,  
Asst. U. S. Atty., Chief Criminal Division;

THOMAS R. SHERIDAN,  
Assistant U. S. Attorney,  
600 Federal Building,  
Los Angeles 12, California.



United States District Court for the Southern  
District of California, Central Division

No. 26241—CD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM ALEX KARIAKIN,

Defendant.

INDICTMENT

[U.S.C., Title 50, App., Sec. 462—Universal Military Training and Service Act]

September, 1957—Grand Jury

The grand jury charges:

Defendant William Alex Kariakin, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said Act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 113, said Board being then and there duly created and acting, under the Selective Service System established by said Act, in Los Angeles County, California; pursuant to said Act and the regulations promulgated thereunder, the defendant was classified in Class 1-A and was notified of said classification; thereafter, a notice and order by said Board was duly given to the defendant to report for induction into the armed forces of the United States of America

on October 4, 1956, and at said time, in Los Angeles County, California, within the Central Division of the Southern District of California, the defendant did knowingly fail and neglect to perform a duty required of him under said Act and the regulations promulgated thereunder in that he then and there knowingly failed and neglected to report for induction into the armed forces of the United States as so notified and ordered to do.

A True Bill.

/s/ E. J. PRUD'HOMME,  
Foreman.

/s/ LAUGHLIN E. WATERS,  
United States Attorney.

Bond fixed in the amount of .....

[Endorsed]: Filed October 2, 1957.

---

United States District Court for the Southern  
District of California, Central Division  
No. 26241—Criminal

UNITED STATES OF AMERICA,

vs.

WILLIAM ALEX KARIAKIN.

### JUDGMENT AND COMMITMENT

On this 10th day of February, 1958, came the attorney for the government and the defendant appeared in person and by counsel, Lionel Richman.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and finding of guilty of the offense of knowingly failing and neglecting to report for induction into the armed forces of the United States of America on October 4, 1956, as charged in the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three years.

It Is Adjudged that execution of judgment is stayed until February 17, 1958, 10:00 a.m.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ HARRY C. WESTOVER,  
United States District Judge.

[Endorsed]: Filed February 10, 1958.

[Title of District Court and Cause.]

### NOTICE OF APPEAL

William Alex Kariakin, 235 South Simmons Avenue, Montebello, California, Appellant;

Lewis Garrett & Lionel Richman, 1250 Wilshire Boulevard, Los Angeles 17, California, Attorneys for Appellant;

Offense: U.S.C., Title 50, App., Sec. 462, Universal Military Training and Service Act.

On February 10, 1958, appellant was sentenced to three years in prison. He is now on bail pending this appeal.

The above-named appellant hereby appeals to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated: February 12, 1958.

LEWIS GARRETT &  
LIONEL RICHMAN,

By /s/ LIONEL RICHMAN,  
Attorneys for Defendant and  
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 13, 1958.

[Title of District Court and Cause.]

APPLICATION FOR ORDER EXTENDING  
TIME TO FILE AND DOCKET RECORD  
ON APPEAL

State of California,  
County of Los Angeles—ss.

The application and affidavit of Lionel Richman respectfully shows:

1. Affiant is attorney of record for appellant herein and duly filed a Notice of Appeal in this cause.

2. Immediately thereafter affiant became involved in the defense of two injunction proceedings in the Superior Court of the State of California in and for the County of Riverside, said proceedings being heard at the court in Indio, California. Said proceedings are entitled, Palm Springs S & S Corp. v. Culinary Workers, etc., Union, case No. Indio 1779, and The Racquet Club v. Culinary Workers, etc., Union, Local No. 535, case No. Indio 1803.

3. That your affiant has devoted all of affiant's time to these proceedings from their inception until March 25, 1958, when said matters were submitted to the court for decision.

Wherefore, your affiant respectfully prays for an order of this Honorable Court extending the time in which the Record on Appeal may be filed and

docketed in the appellate court for an additional period of forty days.

/s/ LIONEL RICHMAN.

Subscribed and sworn to before me this 28th day of March, 1958.

/s/ MARGARET E. NEIL,  
Notary Public in and for Said  
County and State.

### Order

Upon reading and filing the application of Lionel Richman and good cause appearing therefor, it is ordered that the time to file and docket the record on appeal in the appellate court be and it is extended forty days from March 25, 1958.

Dated: 3-28-1958.

/s/ HARRY C. WESTOVER,  
Judge, U. S. District Court.

[Endorsed]: Filed March 28, 1958.

---

[Title of District Court and Cause.]

### CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the



United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages numbered 1 to 10, inclusive, containing the original:

Indictment.

Judgment.

Notice of Appeal.

Designation of Record on Appeal.

Application for Order extending time to file and docket record on Appeal and Order thereon.

B. Plaintiff's Exhibit No. 1.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Dated: April 7, 1958.

JOHN A. CHILDRESS,  
Clerk;

By /s/ WM. A. WHITE,  
Deputy Clerk.

---

[Title of District Court and Cause.]

## STATEMENT OF DOCKET ENTRIES

1. Indictment for viol. 50-462—Universal Military Training and Service Act, filed October 2, 1957.
2. Arraignment, October 21, 1957.
3. Plea to indictment, Not Guilty, October 21, 1957.

4. Motion to withdraw plea of guilty denied,  
....., 1957.

5. Trial by court if jury waived, December 27,  
1957.

6. Finding of guilty, January 27, 1958.

7. Judgment—(with terms of sentence or order,  
3 yrs. impris., Entered February 11, 1958.

8. Notice of appeal filed, February 13, 1958.

[Seal]                      JOHN A. CHILDRESS,  
   Clerk;

By /s/ JOHN F. MAHER,  
   Deputy Clerk.

[Endorsed]: Filed February 17, 1958.

---

[Endorsed]: No. 15977. United States Court of  
Appeals for the Ninth Circuit. William Alex  
Kariakin, Appellant, vs. United States of America,  
Appellee. Transcript of Record. Appeal from the  
United States District Court for the Southern Dis-  
trict of California, Central Division.

Filed April 9, 1958.

Docketed April 11, 1958.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

United States Court of Appeals  
for the Ninth Circuit

No. 15,977

WILLIAM ALEX KARIAKIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS BY APPELLANT

To the Honorable United States Court of Appeals  
for the Ninth Circuit:

Appellant submits herewith a statement of the  
points on which he intends to rely:

1. The evidence was insufficient to sustain the  
judgment of conviction.

2. The local board inferentially set aside the  
classification of appellant and waived his failure  
to report.

3. The local board deprived appellant of due proc-  
ess of law by its failure to reclassify him on or after  
October 11, 1956.

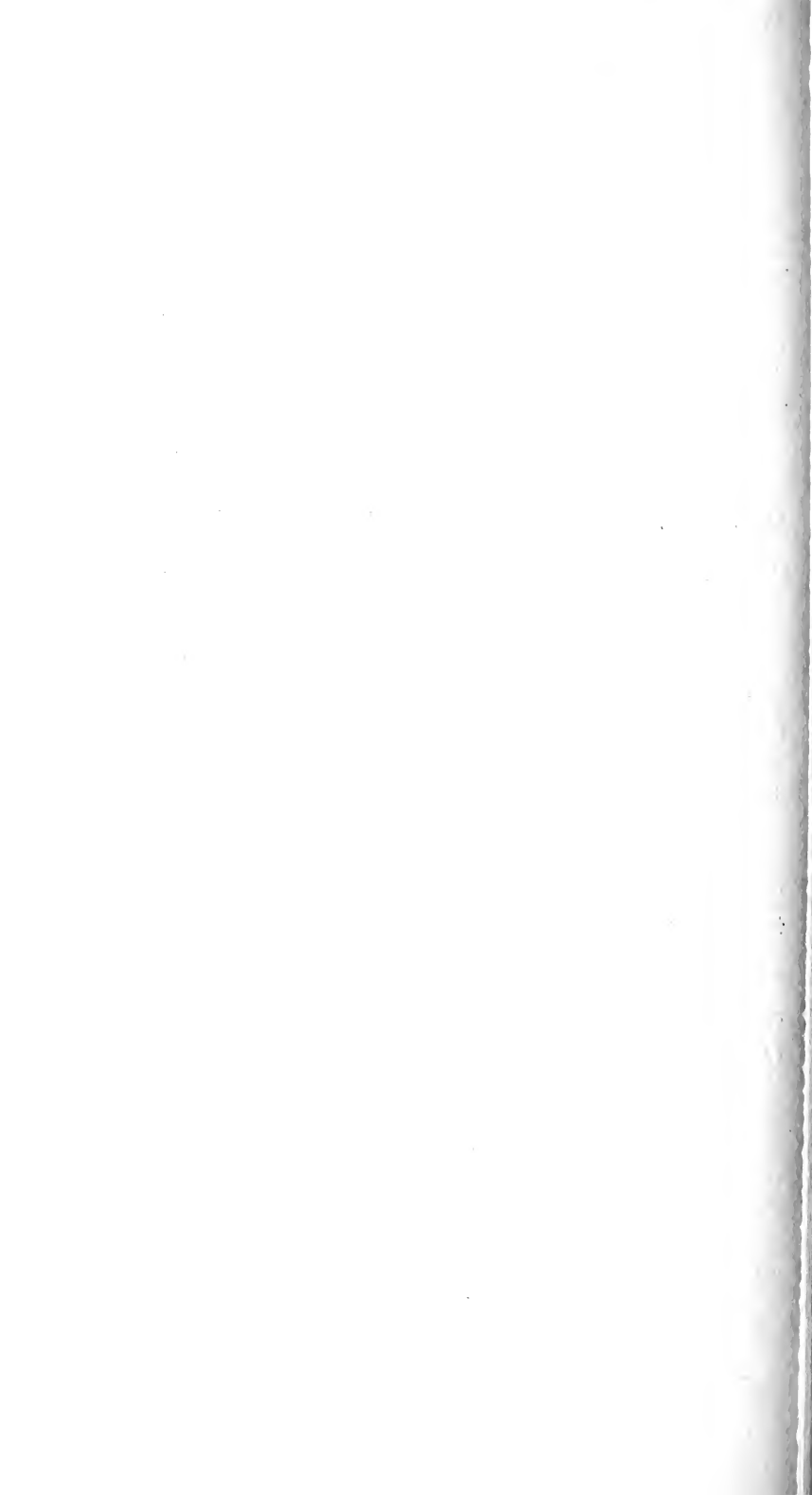
Dated this 9th day of May, 1958.

LEWIS GARRETT &  
LIONEL RICHMAN

By /s/ LIONEL RICHMAN,  
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 12, 1958.



No. 15977

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

WILLIAM ALEX KARIAKIN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

Appeal From the United States District Court for the  
Southern District of California, Central Division.

---

APPELLANT'S OPENING BRIEF.

---

FILED

JUN 30 1958

LIONEL RICHMAN,

1250 Wilshire Boulevard,  
Los Angeles 14, California,

*Attorney for Appellant.*

PAUL P. O'BRIEN, CL



## TOPICAL INDEX

|                              | PAGE |
|------------------------------|------|
| Preliminary statement .....  | 1    |
| Applicable regulations ..... | 2    |
| Questions of law.....        | 3    |
| Argument.....                | 4    |

### I.

|   |   |
|---|---|
| The evidence is insufficient to sustain the conviction..... | 4 |
|---|---|

### II.

|  |    |
|--|----|
| By its action in reopening the question of appellant's classification, the local board barred the prosecution of appellant.. | 8  |
| A. Preliminary statement .....   | 8  |
| B. The court was estopped to prosecute appellant.....  | 9  |
| C. The action of the local board on November 1, 1956, constituted a remission.....   | 10 |

### III.

|   |    |
|---|----|
| Appellant has been deprived of due process of law.....  | 12 |
| A. All actions of the local board after January 16, 1954, are void .....  | 12 |
| (1) The purported grant of authority is void.....   | 13 |
| (2) Assuming, arguendo, that the purported grant of authority was valid, it was never exercised.....                                  | 14 |
| B. The failure of the local board to reclassify appellant on or after October 11, 1956, deprived appellant of due process of law..... | 15 |

### IV.

|  |    |
|--|----|
| Appellant has been once in jeopardy..... | 17 |
| Conclusion .....                         | 18 |

## TABLE OF AUTHORITIES CITED

| CASES  | PAGE   |
|--|--------|
| Brinegar v. United States, 338 U. S. 160.....                    | 4      |
| Christoffel v. United States, 338 U. S. 84.....                  | 4      |
| Knox v. United States, 200 F. 2d 398.....                        | 6, 12  |
| Maryland etc. v. Baltimore & O. R., 3 How. 534.....              | 11     |
| Minneapolis & St. Louis R. v. Peoria etc. Ry., 270 U. S. 580.... | 9      |
| Nielsen, Ex parte, 131 U. S. 176.....                            | 17     |
| Olvera v. United States, 223 F. 2d 880.....                      | 12, 15 |
| St. Joseph Stock Yard Co. v. United States, 298 U. S. 38.....    | 16     |
| Southern R. Co. v. Virginia, 290 U. S. 190.....                  | 16     |
| Tot v. United States, 319 U. S. 463.....                         | 4      |
| United States v. Adamowicz, 119 Fed. Supp. 635.....              | 10, 16 |
| United States v. Ball, 161 U. S. 622.....                        | 17     |
| United States v. Chambers, 291 U. S. 221.....                    | 11     |
| United States v. Derstine, 129 Fed. Supp. 117.....               | 16     |
| United States v. Great Northern Railway, 287 U. S. 151.....      | 9      |
| United States v. Hufford, 103 Fed. Supp. 859.....                | 12, 15 |
| United States v. Shaughnessy, 101 Fed. Supp. 432.....            | 9      |
| United States v. Stewart, 311 U. S. 70.....                      | 9      |
| United States v. Stiles 169 F. 2d 455.....                       | 10, 16 |
| United States v. Zieber, 161 F. 2d 90.....                       | 11     |
| Yakus v. United States, 321 U. S. 414.....                       | 16     |
| Yeaton v. United States, 5 Cranch 281.....                       | 11     |



| REGULATIONS  | PAGE       |
|--|------------|
| Code of Federal Regulations, Sec. 1602.4 .....     | 2          |
| Code of Federal Regulations, Sec. 1604.14 .....    | 13         |
| Code of Federal Regulations, Sec. 1624.4(c) .....  | 2, 10      |
| Code of Federal Regulations, Sec. 1625.3 .....     | 13         |
| Code of Federal Regulations, Sec. 1625.14 .....    | 13, 14, 15 |
| Code of Federal Regulations, Sec. 1626.2.....      | 16         |
| Code of Federal Regulations, Sec. 1642.....        | 2          |
| Code of Federal Regulations, Sec. 1642.3.....      | 6          |
| Code of Federal Regulations, Sec. 1642.4.....      | 2, 6       |
| Code of Federal Regulations, Sec. 1642.14 .....    | 2          |
| Code of Federal Regulations, Sec. 1642.14(c) ..... | 9          |
| Code of Federal Regulations, Sec. 1642.41.....     | 7          |

| STATUTES   |       |
|--|-------|
| United States Code, Title 50, App., Sec. 462 ..... | 1, 12 |
| United States Constitution, Fifth Amendment.....   | 4, 18 |



No. 15977

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

WILLIAM ALEX KARIAKIN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

Appeal From the United States District Court for the  
Southern District of California, Central Division.

---

## APPELLANT'S OPENING BRIEF.

---

### Preliminary Statement.

This cause comes before this Honorable Court by the appeal of the defendant, William Alex Kariakin, from the judgment of conviction of violation of U. S. C., Title 50, App., Sec. 462—Universal Military Training and Service Act. No oral testimony was taken, the entire cause being submitted for decision upon the written file of appellant's local draft board.

Unless the entries in that written file are sufficient to prove every element of the offense covered by the indictment, and unless those entries show a compliance with the Regulations promulgated under the Universal Military Training and Service Act, the conviction cannot be sustained and the judgment of the lower court must be reversed.

## Applicable Regulations.

Certain provisions of the Code of Federal Regulations which will be referred to by appellant in this brief are herein set forth in full.

“1602.4 *Delinquent*. A ‘delinquent’ is a person required to be registered under the selective service law who fails or neglects to perform any duty required of him under the provisions of the selective service law.

“1642—*Delinquents*.

“1642.4 (b) When the local board declares a registrant to be a delinquent, it shall enter a record of such action and the date thereof on the registrant’s Classification Questionnaire (SSS Form No. 100) and shall complete a delinquency notice (SSS Form No. 304), in duplicate, setting forth the duty or duties which the registrant has failed to perform. The local board shall mail the original to the registrant at his last known address and file a copy in his Cover Sheet (SSS Form No. 101).

“(c) A registrant who has been declared to be a delinquent may be removed from that status by the local board at any time. When the local board removes a registrant from delinquency status, it shall enter a record of such action and the date thereof on the registrant’s Classification Questionnaire (SSS Form No. 100) and shall advise the registrant of such removal by letter a copy of which shall be filed in his Cover Sheet (SSS Form No. 101).

“1642.14 *Personal appearance, reopening, and appeal*.

“(b) The classification of a delinquent registrant who is classified in or reclassified into Class I-A or

Class I-A-O under the provisions of this part may be reopened at any time before induction in the discretion of the local board without regard to the restrictions against reopening prescribed in Sec. 1625.2 of this chapter.

“(c) When a delinquent registrant is classified in or reclassified into Class I-A or Class I-A-O under the provisions of this part, an appeal may be taken under the same circumstances and by the same persons as in any other case.”

### Questions of Law.

Appellant raises the following questions of law, to-wit:

1. Is the evidence sufficient to sustain the judgment of conviction?
2. Did the local draft board set aside the classification of appellant prior to his indictment and thus deprive the court of jurisdiction to try him?
3. Has appellant been deprived of due process of law by the local draft board?
4. Has appellant been once in jeopardy?

## ARGUMENT.

### I.

#### The Evidence Is Insufficient to Sustain the Conviction.

As appellant previously noted, all of the evidence submitted to the court was contained in the draft board's copy of appellant's selective service record. That record must be examined to determine the sufficiency of the evidence.

In testing the validity and sufficiency of the evidence, the court must view the record in the light of the Fifth Amendment to the Constitution of the United States.

"An essential part of a procedure which can be said fairly to inflict . . . punishment is that all the elements of the crime charged shall be proved beyond a reasonable doubt."

*Christoffel v. United States*, 338 U. S. 84, 89;

*Brinegar v. United States*, 338 U. S. 160, 174;

*Tot v. United States*, 319 U. S. 463.

Further, the various documents and entries in the file must stand the test of relevancy, competency, and materiality to ensure that, in a criminal proceeding of this nature, appellant will enjoy due process of law.

In referring to the various documents in the selective service file, appellant will use the pagination which appears to have been placed at the bottom of each page in ink or pencil by hand.

Examining the chronology of events reflected by the file we find:

September 21, 1956, SSS Form 252 was mailed to appellant, ordering him to report for Induction on October 4, 1956. (P. 14.)

October 1, 1956, appellant, on receiving the notice to report, dispatched a letter to the draft board acknowledging its receipt, and setting forth his belief in God and his Commandments which prevented him from participating in military service and stating his intention not to report for induction. (Pp. 65-66.)

October 3, 1956, appellant's letter was received by the local board. (P. 14.)

October 8, 1956, the induction papers were returned to the local board. The notation was made in the minutes of the board (Failed to Report for Induction). (P. 14.)

The papers themselves which were returned to the local board bear no notation anywhere upon them indicating that appellant failed to report. (Pp. 27 to 42.)

October 9, 1956, the local board dispatched a letter to appellant asking him to appear at the local board on October 15, 1956. (P. 26.) The local board's minutes are strangely silent concerning the transmission of this communication.

October 11, 1956, apparently appellant appeared prior to the date fixed in the local board's letter of October 9, 1956. At the time of this appearance, a Dependency Form (SSS Form 118) was completed by appellant at the board's request, and his written statement reduced to writing and made part of the board's records. (Pp. 14, 21 to 25.)

November 3, 1956, appellant's cover sheet was transmitted to the State Director. (P. 19.)

November 23, 1956, the State Director was notified by national headquarters that it was determined that appellant be reported to the United States Attorney for prosecution as a delinquent, though the nature of the delinquency is not stated. (P. 18.)

December 11, 1956, the U. S. Attorney was notified by the local board of appellant's alleged delinquency. (Pp. 15-16.)

Completely absent from the file is any evidence of compliance with Section 1642.4(b) requiring the completion of SSS Form No. 304 in duplicate, setting forth the duty or duties which the registrant failed to perform. Equally absent is any evidence that, in accordance with said section, the original of said form was mailed to appellant.

In the absence of Section 1642.3, it would be clear that a failure to comply with Section 1642.4(b) would constitute a violation of due process and would vitiate the proceedings entirely.

*Knox v. United States*, 200 F. 2d 398.

Conceding, *arguendo*, that a failure to comply with Section 1642.4(b) does not part a prosecution of appellant, appellant contends that compliance with Section 1642.4(b) constitutes an essential link in the necessary chain of evidence required to convict appellant for violation of the Act.

In the absence of the execution of SSS Form No. 304, what evidence is there in the record to sustain the conviction?



The Delinquent Registration Report was signed by the clerk of the local board. Her typewritten statement on the Report states:

“On October 4, 1956 the registrant refused to report for Induction. He claims to be a conscientious objector and that his beliefs in God and his commandments will not allow him to enter the Armed Forces.”  
(P. 16.)

Since the obligation of appellant to report for induction required him to report to the Induction Center, rather than the local board, it is clear that the statement of the clerk of the local board is hearsay. If the minutes be examined, it is clear that appellant did not present himself at the local board. The conclusion of the clerk, then, is a conclusion which she drew from appellant's letter to the local board informing them of his beliefs. If this be true, then the report signed by the clerk is even more inaccurate, since appellant's letter was dated October 1, 1956, and received by the local board on October 3, rather than October 4. Thus, the letter was received the day before appellant was required to report to the Induction Center.

The letter from national headquarters to the State Director, in addition to being hearsay, is of no more probative value. It states that appellant should be reported for prosecution “as a delinquent in accordance with the provisions of section 1642.41 of the regulation.” (P. 18.) However, Section 1642.41 encompasses a variety of offenses. It includes registrants who fail to report (subsection a), registrants who fail to report on an Order for Transferred Man to Report for Induction (subsection a), registrants from other local boards suspected of being delinquents (subsection c).

This Honorable Court will note from the voluminous record that appellant has remained steadfast in his beliefs. In 1953, he was indicted, tried and acquitted of the same offense. On that occasion, there was more evidence than is present in the instant case. The Court will note that in 1953, when the papers were returned from the Induction Center to the local board, the Induction Center entered upon the documents "Refused to be inducted 11 Aug. 1953." (P. 46.)

In the present case, there is a total lack of valid, relevant, material inculpatory evidence. Certainly, the record does not start to present evidence sufficient to overcome the presumption of innocence, and it does not even hint at evidence sufficient to show, beyond a reasonable doubt, that appellant has violated the Act.

## II.

### **By Its Action in Reopening the Question of Appellant's Classification, the Local Board Barred the Prosecution of Appellant.**

#### **A. Preliminary Statement.**

Subsequent to the receipt of appellant's letter dated October 1, 1956, setting forth his religious beliefs, the local board instructed him to make a personal appearance at its office. At that time, he was given a dependency questionnaire to complete, and the local board had him reduce to writing his statements as to his religious beliefs, and these documents were then filed and considered by the local board.

It then becomes clear that the local board was considering appellant's letter of October 1, 1956 as a request to reopen the question of his classification and reclassify him in I-O. From the procedure which was followed,

it is apparent that the local board followed Section 1642.14 pertaining to personal appearance, reopening and appeal.

In reaching its determination that appellant was not entitled to reclassification in I-O, or any other classification other than I-A, the local board considered his oral and written statements, and his written dependency questionnaire. Under those circumstances, an appeal lay pursuant to Section 1642.14(c). The action of the local board, then, was not review, but reclassification.

**B. The Court Was Estopped to Prosecute Appellant.**

The power of the court to prosecute for violation of the Universal Military Training Act is no greater than the power of the court to enforce any other administrative order. An administrative determination made by a body duly exercising its grant of power is binding on the agency and upon the court under the doctrine of estoppel.

*United States v. Shaughnessy*, 101 Fed. Supp. 432.

The discharge of an administrative function by a body to whom the authority has been duly delegated is binding upon the government.

*United States v. Great Northern Railway*, 287 U. S. 151, 153;

*United States v. Stewart*, 311 U. S. 70, 71.

A court may not enforce an administrative order, if that order is not in effect at the time judicial enforcement is sought.

*Minneapolis & St. Louis R. v. Peoria etc. Ry.*, 270 U. S. 580.

That the board has the power to strip the court of jurisdiction to prosecute is clear from the regulations.

Under Section 1642.4(c), "A registrant who has been declared to be a delinquent may be removed from that status by the local board at any time." There is no question, then, that the local board has the power to deprive the court of jurisdiction to prosecute. Appellant contends that the local board's power be exercised directly, or inferentially by operation of law.

In the instant case, when appellant appeared before the local board in October, 1956, he presented evidence as to his religious views which may or may not have been new evidence for the local board to consider. In addition, he submitted his dependency questionnaire which was certainly new evidence to be considered. The courts have already held that where a registrant protests the local board's classification and claims an exemption but introduces no new evidence, the board has the duty to again classify and send him another notice of classification.

*United States v. Stiles*, 169 F. 2d 455;

*United States v. Adamowicz*, 119 Fed. Supp. 635.

How much truer is it, then, that where new evidence is presented, the registrant must be reclassified, so that his right of appeal remains intact.

Thus, the classification which existed on October 4, 1956, no longer existed when the indictment was returned. It has been replaced by a newer classification. The court, therefore, was estopped to hear the prosecution.

**C. The Action of the Local Board on November 1, 1956, Constituted a Remission.**

As appellant has heretofore pointed out, pursuant to Section 1642.4(c) the specific power to remove a registrant from delinquency status has been delegated to the

local board. This is the power which it can exercise expressly. It may also review its own classification inferentially. By reopening a classification and examining new proofs, the local board has superseded the old classification as surely as if it specifically declared it null and void. This follows, even though after examining the new proofs, the local board gives the registrant the same classification which he held before. Under similar circumstances, it has been held that a failure or refusal to receive new or further information constitutes a denial of due process of law, whether the local board titles its action an act of review or an act of reclassification.

*United States v. Zieber*, 161 F. 2d 90.

The result of a reclassification is to an administrative agency what the repeal of a criminal statute is to a court. If a statute be repealed or rendered inoperative, no further proceedings can be had to enforce it in pending prosecutions.

*United States v. Chambers*, 291 U. S. 221;

*Yeaton v. United States*, 5 Cranch 281.

“The repeal of the law imposing the penalty is of itself a remission.”

*Maryland etc. v. Baltimore & O. R.*, 3 How. 534,  
552.

It is respectfully submitted that by reopening appellant's classification, even though he was reclassified I-A, the local board remitted the violation, if any, of the prior order to report for induction, and the court was without jurisdiction to prosecute appellant.

III.

Appellant Has Been Deprived of Due Process of Law.

A. All Actions of the Local Board After  
January 16, 1954, Are Void.

Failure to accord registrant the procedural rights provided by the Selective Service Act and the regulations promulgated thereunder invalidates the action of the draft board.

*Knox v. United States*, 200 F. 2d 398.

The very essence of the validity of the draft board orders is that all procedural requirements must be strictly and faithfully followed. A failure to follow them with such strictness and fidelity will invalidate the board's order and a conviction based thereon.

*Olvera v. United States*, 223 F. 2d 880;

*United States v. Hufford*, 103 Fed. Supp. 859.

The local board had ordered appellant to report for induction on June 15, 1953. Based upon his religious beliefs, appellant refused to report for induction. He was declared a delinquent, and an indictment sought and obtained against him for violation of U. S. C., Title 50, App., Sec. 462—Universal Military Training and Service Act. On January 12, 1954, in case number 23221-CD, appellant stood trial in the United States District Court before the Honorable Peirson M. Hall, and acquitted of the charge. (P. 129.)

Upon being notified of the acquittal on technical grounds, the local board sought authority to reopen and reclassify appellant from the District Coordinator. This request was made on or about January 13, 1954. While the letter seeking this permission is undated (p. 128),

the minute entry would indicate that January 13, 1954 was in fact the date. (P. 12.)

On February 15, 1954, authority was granted by the District Coordinator to the local board to reopen the classification and to cancel the order for induction under the provisions of Section 1625.14 of the Selective Service Regulation. (P. 127.)

(1) THE PURPORTED GRANT OF AUTHORITY IS VOID.

Section 1625.3 of the Regulations provide that the local board may reopen and consider anew the classification of a registrant "upon the written request of the State Director of Selective Service or the Director of Selective Service . . . ."

This is a grant of specific administrative authority. It is not a ministerial act which the State Director will be called upon to perform but rather a discretionary one. This being so, in the absence of authority in the Regulations or the Act to delegate the prerogatives of the State Director to a subordinate, any such attempted delegation is void.

Nowhere in the Act or Regulations is the State Director authorized to delegate this function to the District Coordinator. He is limited in the Regulations to the hiring of necessary personnel within the limits of available funds. (Sec. 1604.14.)

Thus, if the State Director failed to act, and if the District Coordinator lacked authority to act, everything done or attempted to be done after January 13, 1954, was also void.

- (2) ASSUMING, ARGUENDO, THAT THE PURPORTED GRANT OF AUTHORITY WAS VALID, IT WAS NEVER EXERCISED.

If we assume, *arguendo*, that the District Coordinator had the authority to reopen the classification, as he purported to do in his letter of February 15, 1954, the local board nevertheless failed to carry out its duties under that grant of authority and the Regulations.

The last paragraph of the letter of February 15, 1954, recites:

“Under the authority vested in me by the State Director of Selective Service for the State of California, the registrant’s classification is hereby reopened under the provisions of Section 1625.3. After the classification has been reopened the local board is authorized to cancel the order of induction under the provisions of Section 1625.14 of the Selective Service Regulations.” (P. 127.)

The provision of the Selective Service Regulations to which the District Coordinator referred to, Section 1625.14, provides:

“When the local board has reopened the classification of a registrant, it shall cancel any Order to Report for Induction (SSS Form No. 252) which may have been issued to the registrant. If, after the registrant’s classification is reopened, he is classified anew into a class available for service, he shall be ordered to report for induction in the usual manner.”

This Section spells out a procedure and a timetable. First, the local board reopens the classification. Second, it cancels any Order to Report for Induction which may



have been issued. Thirdly, it reclassifies the registrant. A failure to follow any one of these steps makes any subsequent steps void.

*Olvera v. United States*, 223 F. 2d 880.

In the instant case, there is a fatal defect violative of Section 1625.14. At no time has the Order to Report for Induction issued to appellant on July 27, 1953 ever been cancelled by the local board. Until that Order is cancelled, the local board lacks authority to reclassify appellant and order appellant to report based upon the results of such reclassification.

Every step taken by the local board since February 15, 1954, following the reopening of appellant's classification is void.

**B. The Failure of the Local Board to Reclassify Appellant on or After October 11, 1956, Deprived Appellant of Due Process of Law.**

After October 4, 1954, appellant was asked to report for a personal interview with the local board. Apparently, his letter dated October 1, 1956, was being treated as a request for a reclassification. On October 11, 1956, the local board heard appellant. It then reduced his statement to writing, in accordance with the reclassification procedure, and also accepted new evidence in the form of the dependency questionnaire.

It then made its order, by a vote of 2 to 0, purporting to review, rather than reclassify. Thereafter, on November 2, 1956, the local board notified appellant that the facts presented did not justify the reopening of his case, or his reclassification. (P. 20.)

Since only classifications or reclassifications are subject to appeal (Sec. 1626.2), the local board deprived appellant of his right to appeal its administrative finding as to the sufficiency of the new evidence to warrant reclassification.

It is axiomatic that due process of law requires an opportunity for review of an administrative decision.

*Yakus v. United States*, 321 U. S. 414, 433;

*Southern R. Co. v. Virginia*, 290 U. S. 190;

*St. Joseph Stock Yard Co. v. United States*, 298 U. S. 38.

Not only may the local board not deprive appellant of the right of appeal by this subterfuge, but it has the affirmative duty to determine if the registrant is seeking some procedural right, and, on ascertaining that he is, grant that procedural right.

*United States v. Derstine*, 129 Fed. Supp. 117.

Even if new evidence had not been presented, where a registrant protests a local board's classification and claims an exemption, the board has the duty to again classify and send him another notice of classification.

*United States v. Stiles*, 169 F. 2d 455;

*United States v. Adamowicz*, 119 Fed. Supp. 635.

Having been deprived of his right of appeal, appellant was deprived of due process of law, and any act taken by the government after October 11, 1956, was void.

IV.

**Appellant Has Been Once in Jeopardy.**

Appellant recognizes that customarily a special defense which is not raised at time of trial is waived. However, a defense based upon a Constitutional guaranty is one which goes to the very jurisdiction of the Court and may be raised at any stage of the proceedings.

A general verdict of acquittal upon an issue of not guilty to an indictment is a protection against a second trial.

*United States v. Ball.* 161 U. S. 622.

Where a person is convicted of a crime which includes several incidents, a second trial for one of those incidents puts him twice in jeopardy.

*Ex parte Nielsen,* 131 U. S. 176.

Appellant has already pointed out that the local board ordered appellant to report for induction on June 15, 1953. For his refusal to report, he was indicted, tried and acquitted. Thereafter, that order to report for induction was never cancelled. It was in full force and effect when he was indicted for the second time. Since it was the only Order validly in effect, it permeates the indictment. The appellant was convicted for failure to report for induction. There was only one order to report for induction then in effect. That order was one which he had already been acquitted of violating. It follows, therefore, that the second trial, and the conviction, constituted double jeopardy.

### Conclusion.

Appellant respectfully submits that his Selective Service Record consists of a litany of errors, oversights, and violations of due process of law. The local board has displayed a relaxed disregard for the Regulations, and the Fifth Amendment to the Constitution. Since the entire case rests upon the service record, and since the record is silent as the evidentiary facts sufficient to support the judgment, the judgment must be reversed.

Respectfully submitted,

LIONEL RICHMAN,

*Attorney for Appellant.*

No. 15977

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

WILLIAM ALEX KARIAKIN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## BRIEF OF APPELLEE.

---

LAUGHLIN E. WATERS,

*United States Attorney,*

ROBERT JOHN JENSEN,

*Assistant United States Attorney,*

*Chief, Criminal Division,*

THOMAS R. SHERIDAN,

*Assistant United States Attorney,*

600 Federal Building,

Los Angeles 12, California,

*Attorneys for Appellee,*

*United States of America.*

FILED

AUG - 1 1958

PAUL P. O'BRIEN, CLERK



## TOPICAL INDEX

### PAGE

#### I.

|                    |   |
|--------------------|---|
| Jurisdiction ..... | 1 |
|--------------------|---|

#### II.

|                        |   |
|------------------------|---|
| Statute involved ..... | 2 |
|------------------------|---|

#### III.

|                            |   |
|----------------------------|---|
| Statement of the case..... | 2 |
|----------------------------|---|

#### IV.

|                             |   |
|-----------------------------|---|
| Statement of the facts..... | 4 |
|-----------------------------|---|

#### V.

|               |    |
|---------------|----|
| Argument..... | 11 |
|---------------|----|

|                             |    |
|-----------------------------|----|
| Preliminary statement ..... | 11 |
|-----------------------------|----|

|   |    |
|---|----|
| Point One. The evidence is sufficient to sustain the conviction ..... | 11 |
|---|----|

|  |    |
|--|----|
| Point Two. The local board did not reopen or reclassify appellant after September 21, 1957, when it ordered him to report for induction..... | 16 |
|--|----|

|   |    |
|---|----|
| Point Three. All actions of Board 113 after January 16, 1954, are not void..... | 24 |
|---|----|

|   |    |
|---|----|
| Point Four. Appellant was not once in jeopardy..... | 27 |
|---|----|

|                  |    |
|------------------|----|
| Conclusion ..... | 28 |
|------------------|----|

|  |   |
|--|---|
| Appendix. Motion for judgment of acquittal.....App. p. | 1 |
|--|---|

## TABLE OF AUTHORITIES CITED

### CASES

|  | PAGE |
|--|------|
| Feuer v. United States, 208 F. 2d 719.....                             | 24   |
| Goodrich v. United States, 146 F. 2d 265.....                          | 27   |
| United States v. Adamowicz, 119 F. Supp. 635.....                      | 23   |
| United States v. Bartelt, 200 F. 2d 385.....                           | 24   |
| United States v. Hufford, 103 F. Supp. 859.....                        | 27   |
| United States v. Nugent, 200 F. 2d 46, rvs'd 346 U. S. 1.....          | 27   |
| United States v. Palmer, 223 F. 2d 893, cert. den. 350 U. S. 873 ..... | 27   |
| United States v. Stiles, 169 F. 2d 455.....                            | 23   |
| Wyman v. La Rose, 223 F. 2d 849, cert. den., 350 U. S. 884....         | 24   |

### RULES

|  |    |
|--|----|
| Federal Rules of Civil Procedure, Rule 44..... | 16 |
|--|----|

### REGULATIONS

|  |            |
|--|------------|
| Selective Service Regulations, Sec. 1602.4.....            | 12         |
| Selective Service Regulations, Sec. 1604.1(g).....         | 25         |
| Selective Service Regulations, Sec. 1604.14.....           | 26         |
| Selective Service Regulations, Sec. 1605.31.....           | 26         |
| Selective Service Regulations, Sec. 1625.2.....            | 19, 21, 22 |
| Selective Service Regulations, Sec. 1625.3.....            | 22         |
| Selective Service Regulations, Sec. 1625.4.....            | 21, 22     |
| Selective Service Regulations, Sec. 1625.14.....           | 25         |
| Selective Service Regulations, Sec. 1642 .....             | 12         |
| Selective Service Regulations, Secs. 1642.1-1642.46 .....  | 12         |
| Selective Service Regulations, Sec. 1642.4.....            | 19         |
| Selective Service Regulations, Sec. 1642.4(a).....         | 13         |
| Selective Service Regulations, Sec. 1642.4(b).....         | 11, 12, 13 |
| Selective Service Regulations, Sec. 1642.10.....           | 19         |
| Selective Service Regulations, Sec. 1642.12.....           | 19         |
| Selective Service Regulations, Sec. 1642.14.....           | 16, 18, 19 |
| Selective Service Regulations, Secs. 1642.41-1642.46 ..... | 14         |
| Selective Service Regulations, Sec. 1642.41(a).....        | 14         |

### STATUTES

|   |      |
|---|------|
| United States Code, Title 18, Sec. 3231.....        | 2    |
| United States Code, Title 50, Appdx., Sec. 462..... | 1, 2 |



No. 15977

IN THE

**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

WILLIAM ALEX KARIAKIN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

**BRIEF OF APPELLEE.**

---

I.

**JURISDICTION.**

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on October 2, 1957, under Section 462 of Title 50, United States Code, Appendix, for knowingly refusing and failing to report for induction into the Armed Forces of the United States as ordered to do by his local board [Tr. 3-4].

After the appellant was arraigned and pleaded not guilty, he was tried in the United States District Court for the Southern District of California, Central Division, before the Honorable Harry Westover, without a jury, on December 27, 1957. At the close of taking evidence and argument of counsel, the court took the case under submission. On January 27, 1958, the court found the appellant guilty as charged in the Indictment. On February 10, 1958, appellant was sentenced to the

custody of the Attorney General for imprisonment for a period of three years [Tr. 4-5].

The District Court had jurisdiction of the cause of action under 50 U. S. C. Appendix 462, and 18 U. S. C. 3231.

## II.

### STATUTE INVOLVED.

The Indictment in this case was brought under Section 462 of Title 50, Appendix, United States Code, which provides in pertinent part:

“(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment. . . .”

## III.

### STATEMENT OF THE CASE.

On October 2, 1957, appellant was indicted for knowingly failing and refusing to report for induction into the Armed Forces of the United States on October 4, 1956, as he was ordered to do by his local board. Appellant pleaded not guilty and the case was set for trial. On December 27, 1957, appellant was tried by the court without a jury. The appellant's Selective Service file was received in evidence, and the Government rested. The appellant (through his trial attorney, J. B. Tietz) then

filed and served a written motion for Judgment of Acquittal. (Appx. No. 1.)

After counsel for both sides argued the matter, the court took the case under submission. On January 27, 1958, the court rendered its decision: guilty as charged. On February 10, 1958, appellant was sentenced to three years imprisonment.

On February 13, 1958, appellant filed a Notice of Appeal [Tr. 6].

On April 22, 1958, appellee received appellant's Statement of Points and Designation of Record which was filed in the District Court. On May 12, 1958, appellee received appellant's Statement of Points which was filed in this court [Tr. 11]. In both of these documents appellant asserted the identical three points upon which he intended to rely in this appeal.

It is to be noted that these same three points were alleged as grounds for a Judgment of Acquittal in the trial court.

Appellant in his brief argues the following points:

1. The evidence is insufficient to sustain the conviction.
2. By its action in reopening the question of appellant's classification, the local board barred the prosecution of appellant.
  - A. Preliminary statement.
  - B. The Court was estopped to prosecute appellant.
  - C. The action of the local board on November 1, 1956, constituted a remission.

3. Appellant has been deprived of due process of law.

A. All actions of the local board after January 16, 1954, are void.

(1) The purported grant of authority is void.

(2) Assuming, arguendo, that the purported grant of authority was valid, it was never exercised.

B. The failure of the local board to reclassify appellant on or after October 11, 1956, deprived appellant of due process of law.

4. Appellant has been once in jeopardy.

Appellee invites a comparison of the grounds alleged for acquittal, the statement of points upon which appellant intended to rely on in this appeal, and the points argued in appellant's brief.

#### IV.

#### STATEMENT OF THE FACTS.

June 12, 1950, appellant registered with Local Board 113, Alhambra, California [Exs. 1, 2].\*

June 11, 1951, appellant returned his Classification Questionnaire (SSS Form 100) to Board 113, in which he signed Series XIV indicating that he claimed conscientious objection to participating in war [Exs. 5-11].

June 18, 1951, appellant returned the Special Form for Conscientious Objector (SSS Form 150) which Board 113 sent him the week before, and in it he claimed exemption from participation in war in any form because

---

\*Ex. refers to Government's Exhibit 1; Appellant's Selective Service File.

of his membership in the Russian Molakon Spiritual Jumpers Church [Exs. 163-166].

November 28, 1951, appellant was classified 1-A-O by a vote of two to nothing by Board 113, and Board 113 notified appellant of his 1-A-O classification (SSS Form 110) the next day [Ex. 12].

December 10, 1951, Board 113 received two letters from appellant in which he claimed he should have a IV-E classification and requesting a personal appearance [Exs. 161, 162].

December 14, 1951, Board 113 advised appellant when to personally appear before them [Ex. 160].

December 19, 1951, appellant personally appeared before Board 113, filed an affidavit, and at the conclusion of the appearance Board 113 by a vote of two to nothing retained appellant in 1-A-O classification [Exs. 12, 158, 159].

December 21, 1951, Board 113 notified appellant (SSS Form 110) of his 1-A-O classification [Ex. 12].

December 26, 1951, Board 113 received a letter from appellant requesting an appeal of his 1-A-O classification for a 1-O classification [Exs. 12, 157].

April 24, 1953, the Appeal Board classified appellant 1-A by a vote of three to nothing after obtaining an advisory recommendation from the Department of Justice [Ex. 12, 147-149, 156].

April 30, 1953, Board 113 notified appellant (SSS Form 110) of his 1-A classification [Ex. 12].

May 1, 1953, appellant ordered to report for his pre-induction physical examination (SSS Form 223) on May 15, 1953 [Ex. 155].

May 21, 1953, Board 113 mailed appellant a Certificate of Acceptability (DD 62) indicating that as a result of his physical examination he was found fully acceptable for induction into the armed services [Ex. 154].

June 1, 1953, appellant ordered to report for induction (SSS Form 252) on June 15, 1953 [Ex. 153].

June 8, 1953, appellant's induction postponed until further notice by State Director of Selective Service and appellant so notified (SSS Form 264) by Board 113 [Ex. 150-152].

June 23, 1953, Mr. C. T. Shirley, Dean, Campus and Athletics, East Los Angeles Junior College, wrote a letter to the Presidential Appeal Board concerning appellant [Ex. 146].

July 27, 1953, Board 113 advised appellant his postponement is over and ordered him to report for induction (C-190) on August 11, 1953 [Ex. 144].

August 11, 1953, appellant reported for induction and refused to submit to induction [Exs. 138-143].

September 2, 1953, Board 113 reported appellant to the United States Attorney, Los Angeles, California, as a delinquent (SSS Form 301) for his refusal to submit to induction [Exs. 136, 137].

January 12, 1954, appellant was tried in the United States District Court, Southern District of California (Case 23221-CD) for refusing to submit to induction, and the Honorable Peirson M. Hall acquitted him on the grounds that the Department of Justice Hearing Officer had committed a procedural error [Ex. 129].

January 13, 1954, Board 113 requested permission to reopen and reclassify appellant [Ex. 128].

February 16, 1954, Board 113 was given permission to reopen and reclassify appellant [Ex. 127].

February 16, 1954, appellant classified 1-A by a vote of three to nothing, and was so notified (SSS Form 110) the next day [Ex. 12].

February 25, 1954, appellant wrote to Board 113 requesting a personal appearance or an appeal [Ex. 126].

March 10, 1954, Board 113 notified appellant that he was to personally appear before them on March 17, 1954 [Ex. 125].

March 17, 1954, appellant personally appeared before Board 113 [Exs. 123, 124], and filed three affidavits [Exs. 120-122] and, after his appearance, he was classified 1-A by a vote of three to nothing [Ex. 13].

March 18, 1954, Board 113 notified appellant (SSS Form 110) of his 1-A classification [Ex. 13].

March 23, 1954, appellant submitted his own résumé of his appearance before Board 113 on March 17, 1954 [Exs. 117-119].

March 30, 1954, appellant appealed from his 1-A classification for a 1-0 classification [Ex. 115].

October 14, 1954, appellant classified 1-A by the Appeal Board by a vote of three to nothing [Ex. 106] after an F.B.I. investigation [Ex. 110-112] and a recommendation from the Department of Justice [Exs. 107-109].

October 19, 1954, Board 113, notified appellant (SSS Form 113) of his 1-A classification [Ex. 13].

December 1, 1954, appellant ordered to report for induction (SSS Form 252) on December 16, 1954 [Ex. 105].

December 14, 1954, appellant's induction postponed until December 30, 1954 because of the Christmas holidays.

December 28, 1954, appellant wrote to Board 113 and advised them he was not going to report on December 30, 1954 for induction [Ex. 99].

December 30, 1954, appellant did not report for induction [Ex. 13].

January 5, 1955, Board 113 received appellant's file and by a vote of two to nothing decided not to reopen his classification, and so notified appellant (C-140) the next day [Exs. 13, 98].

January 17, 1955, Board 113 wrote to appellant and advised him of a meeting set up for him [Ex. 97].

January 18, 1955, Board 113 wrote to appellant and advised him that their letter of January 17, 1955 was in error and he should disregard it [Ex. 96].

March 3, 1955, Board 113 reported appellant to the United States Attorney, Los Angeles, California, as a delinquent (SSS Form 301) for his refusal to report for induction [Exs. 91, 92].

June 16, 1955, Board 113 wrote to the United States Attorney requesting that appellant's file be returned to them for processing under Operations Bulletin #123, and also that appellant's name be removed from SSS Form 302 [Exs. 81-86].

June 17, 1955, Board 113 received appellant's Special Form for Conscientious Objector (SSS Form 150) in



which appellant claimed exemption from both combattant and noncombattant service [Exs. 87-90].

June 21, 1955, the United States Attorney gave Board 113 permission to remove appellant's name from SSS Form 302 and process him under Operations Bulletin #123 [Ex. 80].

July 6, 1955, Board 113 wrote to appellant and requested that he personally appear before the Board on July 11, 1955 [Ex. 79].

July 11, 1955, appellant personally appeared before Board 113 at which time his classification was reopened and Board 113 by a vote of three to nothing classified him 1-A [Exs. 14, 78].

July 12, 1955, Board 113 notified appellant (SSS Form 110) of his 1-A classification [Ex. 14].

July 25, 1955, Board 113 received a letter from appellant appealing his 1-A classification for a 1-O classification [Ex. 76].

August 23, 1956, Appeal Board classified appellant 1-A by a vote of three to nothing [Ex. 75], after a supplemental F.B.I. investigation [Exs. 71, 72], and a recommendation from the Department of Justice [Ex. 69, 70], a copy of which was sent to appellant [Ex. 73].

August 27, 1956, Board 113 notified appellant (SSS Form 110) of his 1-A classification [Ex. 14].

September 21, 1956, Board 113 ordered appellant to report for induction (SSS Form 252) on October 4, 1956 [Ex. 68].

October 3, 1956, Board 113 received a letter from appellant in which appellant stated he was a conscientious objector and would refuse to report for induction [Ex. 65, 66].

October 4, 1956, appellant failed to report for induction [Ex. 14].

October 9, 1956, Board 113 wrote to appellant asking him to appear before the Board on or before October 15, 1956 [Ex. 26].

October 11, 1956, appellant appeared before Board 113 at which time he completed a Dependency Questionnaire (SSS Form 118) claiming no one was wholly or partially dependent upon him for support [Exs. 22-25], and he filed a copy of his letter Board received on October 3, 1956 [Ex. 21].

November 1, 1956, Board 113 received appellant's file and by a vote of two to nothing decided not to reopen his classification but to process him in accord with Local Board Memo 14 [Ex. 14].

November 2, 1956, Board 113 wrote to appellant advising him that they had considered his letter and his Dependency Questionnaire and that the facts presented therein did not warrant reopening or reclassification of his case [Ex. 20].

December 11, 1956, Board 113 reported appellant to the United States Attorney, Los Angeles, California, as a delinquent (SSS Form 301) for his failure to report for induction on October 4, 1956 [Exs. 15, 16].

October 2, 1957, appellant was indicted by the Federal Grand Jury sitting in Los Angeles, California, for failing to report for induction as ordered on October 4, 1956 [Tr. 3-4].

V.

ARGUMENT.

Preliminary Statement.

Appellee did not object to appellant's designation of record or the lack of designating as part of the record his own written and filed "Motion for Judgment of Acquittal" because his "Statement of Points by Appellant" [Tr. 11] did not raise any points that were not raised in the trial court by the "Motion for Judgment of Acquittal." However, "Appellant's Opening Brief" raises arguments that (1) were not raised in the trial court, and (2) were not designated as points appellant intended to rely on upon this appeal. It is for this reason that appellee has provided this court with a copy of appellant's "Motion for Judgment of Acquittal" (see Appendix to Appellee's Brief).

Appellee urges this court to disregard each and every argument appellant has raised for the first time in his appeal brief. The principle and the rule are too well established that an appellant cannot do what appellant here is attempting to do, namely, raise matters on appeal that were not raised at the time of trial.

POINT ONE.

The Evidence Is Sufficient to Sustain the Conviction.

Appellant's argument on this point is two-fold: the local board did not comply with Selective Service Regulation 1642.4(b) because there is no SSS Form 304 in appellant's file [Ex. 1]; and there is a "total lack of valid, relevant, material inculpatory evidence" to show that appellant failed to report for induction as ordered.

Both of these arguments are demonstrably without merit.

Appellant cites under the heading "Applicable Regulation" Section 1642.4(b), which in essence requires a local board to place a delinquency notice (SSS Form 304) in a registrant's file when such registrant is declared to be delinquent. Appellee admits that no such notice was placed in appellant's file. The real issue here is whether or not Section 1642.4(b) is in fact applicable to this case.

Selective Service Regulation 1602.4 defines delinquent as follows:

"1602.4. Delinquent. A 'delinquent' is a person required to be registered under the selective service law who fails or neglects to perform any duty required of him and the provisions of the selective service laws."

Appellant herein is a "delinquent" because he failed or neglected to perform a required duty, namely: report for induction into the armed forces, which is admittedly a duty under the provision of the selective service laws, and he was so declared to be on December 5, 1956 [Ex. 5].

Selective Service Regulations 1642 (including 1642.1 to 1642.46) deal with the subject of "Delinquents." Regulations 1642.1 to 1642.4 are grouped under the heading of "General" meaning that these regulations set forth the general rules on the subject of "Delinquents." Appellant claims 1642.4(b) controls in this case. Obviously subsection (b) of Regulation 1642.4 must be read and understood in the light of the other subsections to the same regulation, and particularly in light of subsection (a).

Regulation 1642.4 provides in full:

"1642.4. Declaration of Delinquency Status and Removal Therefrom.—(a) Whenever a registrant has

failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be a delinquent.

“(b) When the local board declares a registrant to be a delinquent, it shall enter a record of such action and the date thereof on the registrant’s Classification Questionnaire (SSS Form No. 100) and shall complete a Delinquency Notice (SSS Form No. 304), in duplicate, setting forth the duty or duties which the registrant has failed to perform. The local board shall mail the original to the registrant at his last known address and file the copy in his Cover Sheet (SSS Form No. 101).

“(c) A registrant who has been declared to be a delinquent may be removed from that status by the local board at any time. When the local board removes a registrant from delinquency status, it shall enter a record of such action and the date thereof on the registrant’s Classification Questionnaire (SSS Form No. 100) and shall advise the registrant of such removal by letter a copy of which shall be filed in his Cover Sheet (SSS Form No. 101).”

Subsection (a) of this regulation clearly and unequivocally does not apply to appellant when it precludes from consideration thereunder a registrant who fails “to comply with an Order to Report for Induction.” Subsection (b) of the same regulation does not in any way expand or enlarge the applicability of the regulation as set forth in subsection (a). Hence it is indisputable that Regulation 1642.4(b) does not apply to this appellant.

Appellee submits that the regulations which pertain to appellant's delinquency are 1642.41 through 1642.46 which make specific mention of registrants who fail to report for induction, and thus the well-known rule that the special statute prevails over the general statute is applicable here.

Regulation 1642.41(a) provides:

"1642.41(a). Report of Delinquent to United States Attorney.—(a) Every registrant who fails to comply with an Order to Report for Induction (SSS Form No. 252) or an Order for Transferred Man to Report for Induction (SSS Form No. 253) shall be reported promptly to the United States Attorney on Delinquent Registrant Report (SSS Form No. 301); provided that if the local board believes by reasonable effort it may be able to locate the registrant and secure his compliance, it may delay the mailing of such Delinquent Registrant Report (SSS Form No. 301) for a period not in excess of 30 days. A copy of such Delinquent Registrant Report (SSS Form No. 301) shall be placed in the delinquent's Cover Sheet (SSS Form No. 101). The local board may report any other delinquent registrant to the United States Attorney by letter stating all the circumstances. A copy of such letter shall be placed in the delinquent's Cover Sheet (SSS Form No. 101)."

It is submitted that not only does this regulation explicitly control this case, but that the local board followed this regulation in every detail [Exs. 15-16].

The other prong of appellant's argument appears to be that the only proof of whether or not appellant failed or neglected to report for induction is contained in appellant's selective service file (which was received in evi-

dence without objection) and certain statements in documents which are a part of that file are hearsay.

On September 21, 1956, appellant was ordered to report for induction on October 4, 1956 [Ex. 68]. Appellant received this order and acknowledged receipt of it when he wrote a letter to Local Board 113 on October 1, 1956, in which he said "I William Alex Kariakin have received your notice to report for induction into the Armed Service" [Exs. 65-66]. In this same letter appellant stated that he "must refuse" to enter the armed service. On October 8, 1956, four days after appellant was to be inducted into the armed service, Board 113 received the papers from the induction station indicating that appellant failed to report for induction [Ex. 14]. On October 9, 1956, Board 113 wrote to appellant and asked him to come to their office before October 15, 1956 [Ex. 26]. On October 11, 1956, appellant went to the office of Board 113 where he completed a Dependency Questionnaire (SSS Form 118) and wrote out a copy of his letter of October 1, 1956 [Exs. 21-25], and each of these documents was signed and dated (October 11, 1956) by appellant. Thus one week after appellant should have been inducted into the armed service he appeared at Board 113 and reduced to writing his refusal to report for induction. Appellant argues that the typed statement of the clerk of Board 113 which appears on the reverse side of the Delinquent Registration Report (SSS Form 301) [Ex. 16], namely:

"On October 4, 1956 the registrant refused to report for induction. He claims to be a conscientious objector and that his beliefs in God and his commandments will not allow him to enter the Armed Forces"

is hearsay. We do not dispute this. The entire selective service file of the appellant is to some extent hearsay; however, not only was this same file received in evidence without objection from appellant, but even if appellant had objected, such a file is admissible into evidence as an official record kept in the regular course of business under the provisions of Rule 44 of the Federal Rules of Civil Procedure. Appellee feels that in the light of the foregoing facts a discussion of the materiality, probative value and legal effect of admissible hearsay is not warranted. Government's Exhibit 1, appellant's selective service file, contains not only a sufficient amount of evidence to support the judgment of conviction, but the evidence contained therein is valid, material, relevant and was properly received in evidence.

## POINT TWO.

### **The Local Board Did Not Reopen or Reclassify Appellant After September 21 1957, When It Ordered Him to Report for Induction.**

Appellant's argument on this point is not too clear to appellee, but it appears that appellant claims that Board 113 reopened appellant's classification and reclassified him 1-A after he was ordered to report for induction in 1956, and this was done under Regulation 1642.14. From this appellant argues that the trial court was estopped to prosecute appellant and this same action constituted a remission on the part of Board 113. The arguments of estoppel and remission are raised for the first time on appeal.

In appellant's third argument (denial of due process), in subsection B, appellant argues the reverse side of his own argument above when he states that the failure



of Board 113 to reclassify appellant on or after October 11, 1956 constituted a denial of due process of law. Thus, appellant argues Board 113 reclassified him and hence committed a remission and estopped the court from prosecuting; and at the same time appellant claims Board 113 did not reclassify him so he was denied due process of law.

Appellant is apparently attempting to place appellee upon the horns of a dilemma by arguing: either Board 113 reopened and reclassified appellant after he had been ordered to report for induction, and thus estopped prosecution and remitted the violation; or Board 113 did not reopen and reclassify appellant at that time, and this failure denied appellant the right to an appeal which is a denial of due process of law.

There appears to be some fuzzy thinking on this point, but appellee shall endeavor to shave the point clean.

The chronology of events must be kept clearly in mind.

September 21, 1956—appellant was ordered to report for induction on October 4, 1956.

October 1, 1956—Appellant wrote a letter which Board 113 received on October 3, 1956, in which appellant stated he refused to report for induction.

October 4, 1956—appellant did not report for induction.

October 9, 1956—Board 113 wrote to appellant and asked him to come to their office.

October 11, 1956—Appellant went to Board 113's office where he (1) completed a Dependency Questionnaire and (2) again wrote that he would not report for induction.

November 1, 1956—Board 113 by a vote of two to nothing received—not reopened—appellant's file and decided to process it in accordance with Local Board Memo 14.

November 2, 1956—Board 113 sent appellant Form C-140 advising him that they did not reopen his case or reclassify him.

December 5, 1956—Board 113 by a vote of two to nothing declared appellant delinquent and that he should be reported to the United States Attorney as a delinquent.

December 11, 1956—Appellant was reported to the United States Attorney as a delinquent.

At no time in this sequence of events did Board 113 ever purport to reopen the case or reclassify the appellant; yet it is appellant's claim that when the Board said "review" on November 1, 1956, it was actually "reclassifying." There is nothing to support this claim: neither evidence nor argument. No explanation is tendered as to why the board did not really do what it said it did; and no legal reasoning is proffered as to why this court should conclude as a matter of law that the board was as a matter of fact "reclassifying" when it reports that it merely "received." Appellant merely states: "from the procedure which was followed, it is apparent that the local board followed Section 1642.14 pertaining to personal appearance, reopening and appeal" (Appellee's Br., pp. 8, 9). Appellee submits that it is far more apparent that Board 113 "reviewed" appellant's file, unanimously voted not to reopen or reclassify, advised appellant of their action, declared appellant delinquent, and reported him to the United States Attorney as a delinquent. Also, as a matter of Selective Service procedure, Board

113 could not have been following Regulation 1642.14 as appellant suggests because this regulation had no application to this case at that time. Section 1642.14 deals with registrants who are delinquent because of a failure to perform a duty *other than* failure to report for induction (See Regulations 1642.4, 1642.10, 1642.12 and the use of the phrase “under provision of this part” as used in 1642.14). Furthermore, Regulation 1642.14 deals with delinquent registrants and appellant was not declared delinquent until after this claimed reopening and reclassifying took place. Hence, since Section 1642.14 was inapplicable to this case, Board 113 was not following it.

Thus, we see that Board 113 did not reopen or reclassify appellant at any time after September 21, 1956, and appellant's new arguments of estoppel to prosecute and remission are never reached as they both depend upon the question of whether Board 113 “reviewed” or “reclassified” being answered: “reclassified.”

This brings us to the second horn of dilemma: Board 113 denied appellant due process of law by its failure to reopen and reclassify him after October 11, 1956. Appellee is willing to admit that if Board 113 should have reopened and reclassified appellant at this time, then it denied appellant due process of law by denying him the right to a personal appearance and/or appeal which follows a reclassification.

Part 1625 entitled: “Reopening and Considering Anew Registrant's Classification” of the Selective Service Regulations are controlling on the point.

“1625.2. When Registrant's Classification May Be Reopened and Considered Anew.—The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the regis-

trant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

"1625.3. When Registrant's Classification Shall Be Reopened and Considered Anew.—(a) The local board shall reopen and consider anew the classification of a registrant upon the written request of the State Director of Selective Service or the Director of Selective Service and upon receipt of such request shall immediately cancel any Order to Report for Induction (SSS Form No. 252) which may have been issued to the registrant.

"(b) The local board shall reopen and consider anew the classification of a registrant to whom it has mailed an Order to Report for Induction (SSS Form No. 252) whenever facts are presented to the local board which establish the registrant's eligibility for classification into Class I-S because he is satis-

factorily pursuing a full-time course of instruction at a college, university, or similar institution of learning.

“1625.4. Refusal to Reopen and Consider Anew Registrant's Classification.—When a registrant, any person who claims to be a dependent of a registrant, any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, or the government appeal agent files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified, or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required.”

Regulation 1625.2 allows the local board to reopen and reclassify upon the board's own motion or upon the written request of another when accompanied by written information presenting facts not considered when the registrant was classified which, if true, would justify a change in classification. There is no doubt at all that Board 113 did not reopen and reclassify appellant upon its own motion. There is also no specific written request by anyone to reopen appellant's classification; however, it

is arguable that appellant's letter of October 1, 1956, is such a request, and for the sake of argument let us so treat it. There must be written information accompanying the request, and in his letter appellant claims to be a conscientious objector. Appellant was classified 1-A many times and this same claim was considered many times, so obviously, this is not information which was not considered when appellant was last classified, August 23, 1956. If we stretch the regulation a little further and hold that the written information appellant supplied on October 11, 1956 in his Dependency Questionnaire "accompanied" his written request to reopen, then the claim still fails because: first, it is not new information; and second, even if it were new and it was true, it would not justify a change in classification as appellant therein stated that no one was dependent upon him. This same regulation also provides that the board "shall not" reopen a registrant's classification after an Order to Report for Induction has been mailed and unless it "first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." Here appellant was under such an Order to Report for Induction, and it is apparent that the Board not only did not specifically find the necessary change in appellant's status, but it could not have so found because there was no such change. Therefore, Section 1625.2 as applied here prohibited Board 113 from reopening appellant's classification.

Regulation 1625.3 directs the local board to reopen in certain limited cases, and has no application to the facts of this case.

Regulation 1625.4 provides that when a registrant (or others not applicable here) files a written request with

the local board to reopen his classification and the local board determines that the information accompanying such request fails to present new facts which, if true, would justify a change in classification, then the local board shall not reopen, and shall advise registrant accordingly. Once again, assuming that appellant's letter of October 1, 1956 is a request to reopen and the information it contains plus the information contained in the Dependency Questionnaire accompanied said request, then Board 113 fully complied with this section when on November 2, 1956, it wrote to and advised appellant that it was not reopening his classification based upon such information [Ex. 20].

Appellant cites two cases which he contends holds "that where a registrant protests the local board's classification and claims an exemption but introduces no new evidence, the board has the duty to again classify and send him another notice of classification" [Appellee's Br., p. 10]. The two cited cases are:

*United States v. Stiles*, 169 F. 2d 455 (3rd Cir. 1948);

*United States v. Adamowicz*, 119 F. Supp. 635, 1954.

In the *Stiles* case the court was called upon to construe Section 625.2 of the old act, which is now Section 1624.2 of the present act, which gives a registrant a right to personal appearance within ten days of being mailed a notice of his classification. Neither the holding nor any principle laid down in that case is controlling or even applicable here.

In the *Adamowicz* case the registrant had been classified IV-E, and when this classification was eliminated

in favor of a new designation (1-O) the local board, acting on orders from the State Director, reclassified the registrant. This reopening and reclassifying was done upon the local board's own motion and at a time when the registrant was not under an order to report for induction.

Appellee believes the following cases sustain his position on these regulations just cited.

*Wyman v. La Rose*, 223 F. 2d 849 (9th Cir. 1955), cert. den., 350 U. S. 884;

*Feuer v. United States*, 208 F. 2d 719 (9th Cir. 1953);

*United States v. Bartelt*, 200 F. 2d 385 (7th Cir. 1952).

It is apparent then that Board 113 did not and should not reopen and reclassify appellant at any time after September 21, 1956, and appellant has not been denied a rightful opportunity to appeal.

### POINT THREE.

#### All Actions of Board 113 After January 16, 1954, Are Not Void.

This too is an argument that is raised for the first time on appeal.

Appellant argues as follows: June 1, 1953, Board 113 ordered him to report for induction on June 15, 1953; he was then indicted, tried, and acquitted for refusal to submit to induction, after which the local board requested and received authority to reopen and reclassify appellant from the District Coordinator; the District Coordinator lacks authority to act in such a situation; hence everything done or attempted since January 13, 1954 was void. Appellant argues further that even if the District Co-



ordinator had such authority, the local board violated Section 1625.14 because it did not cancel the order to report for induction that was issued on July 27, 1953, and hence all actions since that date are void.

Again the chronology of events must be clearly elucidated.

June 1, 1953—Board 113 ordered appellant to report for induction on June 15, 1953.

June 8, 1953—State Director of Selective Service postponed appellant's induction until further notice.

July 27, 1953—Board 113 advised appellant his postponement was over and he is to report for induction on August 11, 1953.

August 11, 1953—Appellant reported as ordered but refused to submit to induction.

January 12, 1954—Appellant was tried and acquitted for his refusal to submit to induction on August 11, 1953.

January 13, 1954—Board 113 requested permission to reopen and reclassify appellant from the District Coordinator.

February 16, 1954—Board 113 received the requested permission from the District Coordinator.

From this sequence of events it is clear that the order to report for induction of July 27, 1953 is not a new order to report but merely a continuance of the order of June 1, 1953. And it was this very same order that was the basis of the prosecution in 1954 which resulted in appellant's acquittal.

Regulation 1604.1 and subsection (g) provide:

“1604.1. The Director of Selective Service shall be responsible directly to the President. The Director

of Selective Service is hereby authorized and directed:

“(g) To delegate any of his authority to such officers, agents, or persons as he may designate, and to provide for the subdelegation of any such authority.”

Also see Regulations 1604.14 and 1605.31.

The letter from the District Coordinator to Board 113 says:

“Under the authority vested in me by the State Director of Selective Service for the State of California, the registrant’s classification is hereby reopened under the provisions of Section 1625.3.”

Thus it is clear then that the State Director has authority to delegate his powers and, in fact did delegate his powers, to his District Coordinator.

Appellee admits that there is nothing in the file to indicate that the Order to Report for Induction was canceled; however, appellee also points out that there is nothing in the file to show that this order was not canceled. In other words, the only way to determine whether or not this order to report for induction was canceled is to look at the subsequent treatment it received. Obviously the appellant ignored this order to report once he was found not guilty; and it is equally apparent that Board 113 (if it did not in fact cancel it) treated it as canceled.

We also ask what is the legal effect of the Order to Report for Induction after the District Court entered a judgment of acquittal as to the very same order? Appellee submits that the judgment of acquittal has the legal effect of rendering that order to report for induction null and void. And assuming the local board did

not cancel this order, it is axiomatic to state that the court will not require a useless act. Also, still assuming the order was not canceled, appellant's conclusion that everything done thereafter by the local board is void is a barefaced, unsupported, and unwarranted conclusion. Appellant is saying, in effect, that cancellation in this instance is jurisdictional, and this is unsupportable. One final point in this regard is that it is quite apparent that appellant has been in no way prejudicial if the order was not canceled.

#### POINT FOUR.

##### Appellant Was Not Once in Jeopardy.

This asserted defense of double jeopardy is raised for the first time on appeal.

The cases are clear that although a judgment of acquittal is a final determination of a pending charge in a selective service prosecution, it does not preclude further processing by the selective service system or a subsequent successful prosecution for failure to comply with another order.

*United States v. Nugent*, 200 F. 2d 46 (2nd Cir. 1952), reversed on other grounds, 346 U. S. 1;

*United States v. Hufford*, 103 F. Supp. 859.

The fact that a registrant was convicted and served a prison sentence for violation of a selective service law does not preclude prosecution for a subsequent violation of the law after his release from confinement.

*United States v. Palmer*, 223 F. 2d 893 (3rd Cir. 1955), cert. den., 350 U. S. 873;

*Goodrich v. United States*, 146 F. 2d 265 (5th Cir. 1944).

### Conclusion.

Appellee respectfully submits that:

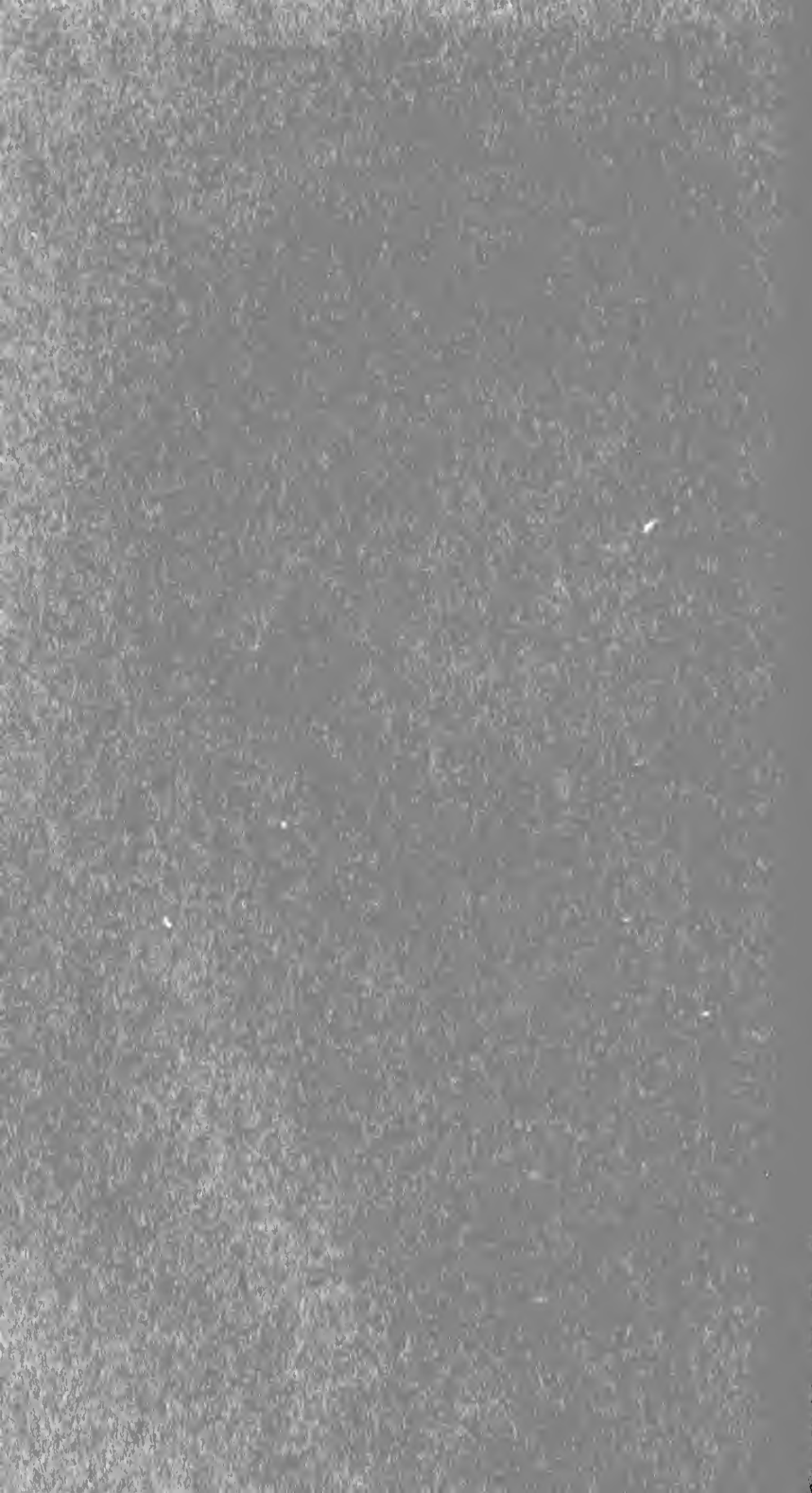
1. The evidence is sufficient to sustain the conviction.
2. The local board did not and should not reopen his case and reclassify appellant at any time after September 21, 1956 when it ordered appellant to report for induction.
3. The actions of the local board after January 16, 1954 or at any other time were not and are not void.
4. The appellant has not been once in jeopardy.
5. The judgment of the trial court should be sustained.

LAUGHLIN E. WATERS,  
*United States Attorney,*

ROBERT JOHN JENSEN,  
*Assistant U. S. Attorney,  
Chief, Criminal Division,*

THOMAS R. SHERIDAN,  
*Assistant U. S. Attorney,  
Attorneys for Appellee, United  
States of America.*





## APPENDIX.

In the United States District Court in and for the Southern District of California. No. 26241.

United States of America, Plaintiff vs. William Alex Kariakin, Defendant.

### MOTION FOR JUDGMENT OF ACQUITTAL.

MAY IT PLEASE THE COURT:

Now comes the defendant and moves the court for a judgment of acquittal for each and every one of the following reasons:

1. There is no evidence to show that the defendant is guilty as charged in the indictment, in that the local board waived his failure to report at the induction station, and did not thereafter send him another Order to Report.

2. The Government has wholly failed to prove a violation of the Act and Regulations by the defendant as charged in the indictment.

3. The denial of the conscientious objector status by the selective service system and the recommendation by the Department of Justice and Board of Appeal were without basis in fact, arbitrary, capricious and contrary to law.

4. Defendant was denied procedural due process in that the local board failed to have available an Adviser to Registrants and to have posted conspicuously or any place, the names and addresses of such adviser, as required by the Regulations, and to defendant's prejudice.

5. The local board deprived defendant of his procedural rights to an Appearance before Local Board and

to an administrative appeal when it failed to formally reclassify him on or after October 11, 1956.

6. The plaintiff has failed to show that jurisdiction existed in the Selective Service System empowering it to issue to defendant a valid induction order.

/s/ J. B. Tietz

J. B. Tietz

*Attorney for Defendant*













